

HOW DO JUDGES COMMENT EXTRAJUDICIALLY AFTER THE
CONSTITUTIONAL REFORM ACT 2005?

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Abstract

The Constitutional Reform Act 2005 (CRA) has altered the channels of communication between the judiciary and the political class.

This thesis investigates the changing role of the senior judiciary in England and Wales in making extrajudicial comments. The underlying theme in this thesis is how approaches to, and judicial self-regulation of, extrajudicial comment and judicial communication centres on the core principles of the separation of powers and judicial independence. In particular, the thesis focuses on speeches and oral evidence to Parliament, as increasingly important forms of judicial-political communication after the CRA, and the post-CRA guidance to judges to consider when communicating via these means. The thesis argues that, in order to assess the channels of communication, we must know: firstly, what things are being communicated between judges and politicians; and secondly, a set of criteria to assess the use of existing means to communicate these things. This thesis assesses the current channels of communication, and concludes that they are deficient, and a poor replacement for the pre-2005 state of affairs. To answer this deficiency, the thesis concludes by exploring the reforms currently being discussed in Parliament, and argues for a new process for triggering judicial appearances before Parliamentary committees.

For Brosef.

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CHAPTER 1 - AN INTRODUCTION

Rationale

The Constitutional Reform Act 2005 (CRA) introduced a number of important reforms, including the reform of the office of Lord Chancellor and the removal of the highest domestic court from the UK Parliament. In October 2009 a new UK Supreme Court (UKSC) was created to replace it.¹ These changes significantly altered the position of senior judges on the constitutional map of the UK. The Law Lords were removed from Parliament where they had enjoyed a dual power: they were able to sit in the Appellate Committee of the House of Lords as the highest court in the land, and also to exercise their right as peers to participate in legislative debates. Deprived of their right to speak² in the upper chamber, the senior judiciary³ has now lost what some of them regarded as an important means of communicating with the political class.⁴ Changes were also made to the role of the Lord Chancellor. Formerly, the Lord Chancellor was head of the judiciary in England and Wales, a Cabinet minister, and also de facto speaker of the Lords. As head of the judiciary the Lord Chancellor would preside as a judge, as well as performing a leading role in judicial

¹ For an overview of constitutional reform in the United Kingdom from 1911 to the position prior to the Constitutional Reform Act 2005, see V Bogdanor, *Our New Constitution*, (2004) LQR 242

² It should be noted that following a statement from Lord Bingham in 2000, most Law Lords adhered to a self-denying ordinance, limiting participation in legislative debates. Lord Bingham's own thoughts on this can be found in: T Bingham, *The Business of Judging. Selected Essays and Speeches*, (OUP 2000), pp.76-7

³ Here senior judiciary refers to the Law Lords, Master of the Rolls and the Lord Chief Justice as well as judges who, on appointment were by convention, were members of the Lords

⁴ Whilst some had opposed the changes, others were keen to forego the right to sit in the upper chamber; when the reforms were initially proposed in 2003, four were in favour of the new UKSC (Lords Bingham, Steyn, Saville, and Walker) and six opposed (Lords Nicholls, Hoffman, Hope, Hutton, Millet, and Rodger). Lady Hale, in favour of the UKSC, replaced Lord Millet on his retirement in 2004; see A Le Sueur, *From the Appellate Committee to Supreme Court: A Narrative*, in L Blom-Cooper, B Dickson and G Drewry, *The Judicial House of Lords 1876-2009*, (OUP 2009) 72. See also R Stevens, *The English Judges: their role in the changing constitution*, (Oxford: Hart Publishing 2005); A Leyland, *The constitution of the United Kingdom*, (2nd Ed. Oxford: Hart Publishing 2012) 202; R Stevens, *A loss of innocence?: judicial independence and the separation of powers* (2014) 19 OJLS 365-402

appointments.⁵ But, as a result of the CRA, the Lord Chancellor is today ‘just another’ Cabinet minister, responsible for government policy on the administration of justice.⁶ The vital role that was traditionally said to have been played by Lord Chancellors in ensuring effective communication between the Cabinet and judiciary has been ‘lost’. The result of this loss is that there is now no judicial representative to speak in Cabinet or Parliament. Today the Lord Chief Justice is head of the judiciary in England and Wales, but the holder of this office has also been stripped of the right to participate in legislative debates in the Lords.⁷

As Lord Judge suggested in his last evidence session before Parliament as Lord Chief Justice, it is arguable that ‘something has been lost’ since 2005, in terms of the opportunities for senior judges to communicate with politicians.⁸ This thesis investigates some of the more public ways that the political and senior judicial branches communicate with each other, and establishes a way to assess whether the channels of communication available today are sufficient. In doing so, this thesis does not directly address the many important ways that senior judges, politicians and government officials communicate in private: for example, the regular meetings and telephone conversations between the Lord Chief Justice and the Lord Chancellor; the routine meetings that occur day to day between officials in the Judicial Office and the Ministry of Justice; and the relatively recent development of regular meetings once

⁵ For a historical overview of the office of Lord Chancellor, and detailed discussion of the various functions and criticisms of the office pre-reform, see D Woodhouse, *The office of the Lord Chancellor* (Oxford: Hart Publishing 2001)

⁶ A detailed discussion of the duties and responsibilities of the office of Lord Chancellor post-CRA 2005 can be found at, G Gee, *What are Lord Chancellors for?* [2014] PL 11, and further in Shetreet and Turenne, *Judges on Trial: The Independence and Accountability of the English judiciary* (CUP 2013), 75

⁷ By convention the office holder is made a peer on appointment as the Lord Chief Justice, although under the CRA he or she may not participate as a peer in the business of the House: see Constitutional Reform Act 2005 s.137

⁸ J Rozenburg *Lord chief justice: changes to judiciary 'eroding something important'* The Guardian 30 January 2013, (available at <http://www.theguardian.com/law/2013/jan/30/lord-chief-justice-changes-judiciary>)

or twice a year between the Lord Chief Justice and the Prime Minister.⁹ Nor does this thesis look at each and every public means of communication: for example, only passing reference is made to the new power under s.5 whereby the Lord Chief Justice can lay written representations before Parliament.¹⁰ Rather, this thesis focusses on what are arguably the two most prominent and public means of judicial-political communication: namely, the long historical practice of extrajudicial speechmaking as a means of communicating judicial ideas; and the more recent and increasingly important practice of judges being called to give evidence before Parliamentary committees. The premise of my thesis is that judicial speechmaking and appearances before Parliamentary committees have acquired an added significance since—and, for that matter, because of—the changes introduced by the CRA.

The importance of these two modes of communication above others, and their increasing importance since 2005, is suggested, at least in part, by the fact that their frequency and content have become the subject of some debate, and, in turn, have been subject to an attempt to regulate them. The use of public speeches by senior judges to convey concerns to political actors has long been an extrajudicial activity undertaken by judges. But recently concern has grown in some quarters about the frequency of judicial speechmaking. In 2012 the Master of the Rolls, Lord Neuberger, made extrajudicial speechmaking the subject of (perhaps ironically) a speech.¹¹ In this speech Lord Neuberger set out informal guidance on how judges should approach extrajudicial speechmaking. He concluded with seven principles to guide judges in deciding what to comment on, and whether to comment at all. In summary

⁹ For examples, see the Lord Chief Justice's Report 2013, *Relationship with the Executive*, at page 14 (available at http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/lcj_report_2013.pdf)

¹⁰ G Gee *The Lord Chief Justice and Section 5 of the Constitutional Reform Act* U.K. Const. L. Blog (14th April 2014) (available at: <http://ukconstitutionallaw.org/>)

¹¹ Neuberger, *Where Angels fear to tread*, Holdsworth Club, University of Birmingham, March 2012 (available at <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-holdsworth-lecture-2012.pdf>)

the Neuberger principles include: the suggestion that speechmaking by judges should be done with caution and prior consideration given to the need to speak; the effect on individual and institutional judicial independence; the concurrence with the position adopted by the LCJ; the effect on the separation of powers; and the avoidance of publicity for publicity sake. Lord Neuberger's speech is an attempt to establish informal guidance regulating speechmaking. There has been a more formal attempt to regulate judicial appearances before Parliamentary committees. In July 2008 the Judicial Executive Board published official guidance regulating oral evidence to Parliamentary committees, which was later updated in 2012.¹² We revisit these regulations in later chapters. For now, my suggestion is simply that formal and informal species of regulation point to a growing awareness, at least among senior judges, of the increasing importance of speechmaking and appearances before Parliamentary committees, as tools for communicating with the political branches.

The central research question in this thesis asks 'how do judges communicate extrajudicially since the CRA 2005?'. To answer this question, it is necessary to investigate and analyse the process and content of extrajudicial speechmaking and oral evidence as well as the reception of such comments by politicians, other judges, and the media. This analysis is used to inform an in depth normative study of the existing modes of extrajudicial communication in chapter four, subject to newly established criteria which list the requirements of an effective and constitutionally proper channel of judicial political communication. This study and these criteria are then used as a basis to critically analyse the proposed reforms to judicial-political relations that are currently being discussed in Parliament. In particular, I ask what safeguards or guidance exists to ensure judicial-political communication is constitutionally proper i.e. to

¹² Parliamentary Clerks also prepared their own internal guidance, but this is not published to the public. In this thesis I focus solely on the JEB's published guidance

protect the core principles of the separation of powers and judicial independence when speechmaking or giving evidence (and are these sufficient)? If not sufficient, then why not; and what would be an adequate replacement or reform? The thrust of this thesis is to investigate and assess these two forms of judicial-political communication and their added significance in light of the CRA reforms, before assessing the proposed reforms currently being discussed. If the methods of constitutionally acceptable interactions that currently exist prove inadequate, then it is reasonable to conclude that the reforms of the CRA are not yet complete, and a long-term process of reform must continue.

In this introduction, I explain how the constitutional principles of judicial independence and the separation of powers underpin the CRA reforms, and in turn impact on interactions between the judiciary, Parliament and the executive. In chapter two I examine how attitudes to (and in particular attempts to regulate) extrajudicial speeches have changed over the years. One of the key themes in chapter two concerns the diversity of judicial speeches: a great many different judges at different levels of the judicial hierarchy make speeches, to different audiences, about different subjects, and with different (and usually) multiple purposes in mind. Recognising this, chapter two outlines a system for classifying speeches. In chapter three I sketch the practice of judges giving oral evidence before Parliamentary committees; examine the formal guidance given to judges on committee appearances; and investigate the content of committee appearances from a carefully selected sample. Finally, chapter four draws on the analysis conducted in chapters two and three in order to establish a set of criteria detailing what is required to make a ‘successful’ communication. This then provides a standard by which to test proposed reforms (currently being discussed in Parliament) to the channels of judicial-political communications in the second half of chapter four. This thesis concludes that these reforms are unsatisfactory in isolation. However, this thesis

proposes that a workable solution could be created by bringing together elements of each of the proposed reforms, thereby establishing a way for senior judges to open a direct channel of communication with Parliament.

Judicial Independence and the Separation of Powers

When the reforms discussed above were first proposed by the Blair government in 2003, the reasons given centred on judicial independence and the separation of powers.¹³ It is often remarked that judicial independence is a slippery notion. It can be difficult to define as an abstract notion in any comprehensive fashion, and it can be equally difficult to determine its precise content.¹⁴

It is now generally acknowledged that there are two main limbs to judicial independence: first, an *individual* limb relating to the requirement that each judge is able to decide legal disputes impartially and free from inappropriate interference, especially any improper interference from political forces; and second, an *institutional* limb relating to the requirement that the judiciary as a whole must enjoy a measure of separation from, and insulation against, any improper pressures from the political branches of government. As Arden LJ put it:

‘... [Judicial independence] involves at least two things:

¹³ A detailed overview of the process and arguments for the drafting and implementation of the CRA can be found in Ryan, *The House of Lords and the shaping of the Supreme Court* (2005) 56 NILQ 135; Windlesham, *The constitutional reform act 2005: Ministers, Judges and Constitutional Change Part 1*, (2005) PL 806; Windlesham *The constitutional reform act 2005: Ministers, Judges and Constitutional Change Part 2* (2006) PL 35. A summary of the process can be found in Bingham, *The old order changeth*, (2006) 122 LQR 211

¹⁴ See generally P Russell and D O’Brien, *Judicial independence in the age of democracy: critical perspectives from around the world*, (University of Virginia Press 2001); Dodek and Sossin, *Judicial Independence in Context* (Irwin Law 2010)

- (1) it involves the judge in any individual case being free to reach the decision which he or she considers to be in accordance with the law, free from any influence¹⁵
- (2) it means institutional independence, i e, it involves the notion that respect is given for the judiciary as an institution¹⁶

In other words, judges as individuals should be both personally and substantively independent; the former demanding a secure tenure and salary outside of any control or interference from other bodies, and the latter requiring that judges make no determinations or act save in accordance with the law, and the facts as presented before them.¹⁷ Structurally, institutional independence demands the independence of the judiciary as a whole, free from interference and singularly distinct from the legislature and executive. The institution of the judiciary, in order to be independent, must be a distinct entity, an identifiable collective, which can be addressed and given the respect of being free from interference. What this means in practice varies from country to country, and over time within any one country. However, it is generally acknowledged that institutional independence requires a set of rules on matters such as judicial deployment, judicial discipline and the funding and staffing of the court system as a whole. This institutional arrangement secures for the judiciary, as a collective, an appropriate measure of separation from, and protection against, undue pressure by the political branches.

¹⁵ Including over issues of pay and pensions – further discussion of the various meanings of judicial independence can be found in R Stevens, *English Judges, Their Role in the Changing Constitution* (Oxford: Hart Publishing 2005)

¹⁶ M Arden, *Judicial Independence and Parliaments* in K Ziegler, D Baranger and AW Bradley, *Constitutionalism and the Role of Parliaments*, (Oxford: Hart Publishing 2007)

¹⁷ S Shetreet, *Creating Culture of Judicial Independence: The practical challenge and the conceptual and constitutional infrastructure*, in S Shetreet and C Forsyth: *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*, Ch. 2 (Martinus Nijhoff, 2008), 46

The concepts of judicial independence and the separation of powers are connected,¹⁸ ‘especially as regards the impact of independence on relations between the main branches of government. If the executive respects the judiciary as an institution, the more the executive is likely to respect court judgments.’^{19,20}

It might be thought that the separation of powers is more of a structural concept. It requires that the three branches of government—the executive, legislature, and judiciary—be separate and individual, with no one branch holding more power and authority than the other, all the while having the power to check and balance each other branch.²¹ As a structural concept, the separation of powers delineates the responsibilities of the three branches of government. But judicial independence is sometimes described as a primarily relational concept: it is about shaping a particular set of relationships, especially between the judiciary and the political branches.²² Judicial independence also contains structural elements as set out above. In a way, judicial independence dictates the nature of the relationship and the duties and responsibilities of the government and Parliament, in matters relating to the judiciary, as well as the responsibility of judges to remain independent. This is only the briefest of thumbnail sketches of judicial independence and the separation of powers. But it is enough, for our purposes at least, to suggest that the concepts of separation of powers and judicial independence, whilst distinct, are also very much intertwined.

¹⁸ AW Bradley, *Relations between Executive, Judiciary and Parliament: an evolving saga?* (2008) PL 470 at 487

¹⁹ *M v Home Office* [1992] QB 270 at 314. Per Nolan LJ: ‘The proper constitutional relationship of the executive with the courts is that the courts will respect all acts of the executive within its lawful province, and that the executive will respect all decisions of the courts as to what its lawful province is’

²⁰ Though some commentators believe that the doctrine of judicial independence is distinct and not synonymous with a separation of powers: see L Kornhauser *Is Judicial independence a useful concept?* in Burbank and Friedman, *Judicial Independence at the Crossroads: An interdisciplinary approach* (SAGE publications 2002)

²¹ For a historical overview of the importance of, and development of, the separation of powers in the UK, see, Shetreet and Turenne, *Judges on Trial: The Independence and Accountability of the English judiciary* (CUP 2013) and a modern statement of the implications of doctrine post 2005, at page 272

²² P Russell and D O’Brien, *Judicial independence in the age of democracy: critical perspectives from around the world*, (University of Virginia Press 2001)

The separation of powers was once said to have only limited application in our constitutional system. Amongst the evidence to support such a claim were the multiple and overlapping institutional roles performed by the Lord Chancellor and the location of the top court in the upper chamber of Parliament. Today, the CRA is commonly cited as evidence of the increasing relevance of the separation of powers. The duty of the executive to respect judicial independence and judicial functions under the separation of powers is now set out in s.3(1) of the CRA 2005, the full consequences of which have yet to be seen.²³ Included as a condition of the Concordat reached between Lord Woolf and Lord Falconer, Bradley observes that the possibility for greater application of the statute as a result of judicial review, or enforcement of the statute against interfering ministers, now exists.²⁴ This increased application of the doctrine of a separation of powers must not, however, be viewed as an ‘iron curtain’ preventing any interaction between the branches of government.

There are instances when the executive may respect a court’s judgment, as per judicial independence, but necessarily require Parliament to legislate to undo that judgment under its role in the separation of powers as legislator—for example where a decision may lead to the undoing of large scale government action resulting in detriment to society.²⁵ But the generally accepted rule is one of mutual respect between the branches of government.²⁶ Institutional

²³ See Masterman *A Supreme Court for the UK: Two steps forward but one step back on judicial independence* [2004] PL 48 for thoughts on judicial independence as an impetus for the CRA

²⁴ AWBradley (n18) 470, However, not all agree.: see G Gee *Defending Judicial Independence in the British Constitution* in A. Dodek and L. Sossin (eds) *Judicial Independence in Context* (Toronto: Irwin Law, 2010) 381-410.

²⁵ Shetreet, (n17); J Bell, *Judicial Cultures and Judicial Independence*, 4 (2001) CYBLS 47

²⁶ For thoughts of senior judges on judicial independence see: Lord Judge Evidence to House of Lords Select Committee on the Constitution, *Relations between the executive, judiciary and Parliament*, 6th Report (2006-7 HL 151), 1 May 2007, answer to Q 379 (available at <http://www.publications.Parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>) ; Lord Phillips of Worth Matravers, *Judicial independence*, Commonwealth law conference, Nairobi, 12 September 2007 (available at <http://www.judiciary.gov.uk/wp->

independence depends on structural compliance with constitutional fundamentals that the executive must not interfere nor criticise judicial findings. But more importantly it also requires that the branches of government communicate with each other in order to keep each other informed of what they are doing; to educate each other as to their roles, functions, processes of appointment etc.; and thereby ensure mutual respect and effective government.

The core concepts of the separation of powers and judicial independence are a constant theme in this thesis and are specifically drawn upon later when assessing the sufficiency of the channels of communication between judiciary and government. These are widely accepted to be the key constitutional principles governing interactions between the judiciary and politicians. The strong need to observe them will be relevant in our discussion of what judges actually say in practice (whether in compliance or not with these principles) and later when we consider whether the proposed reforms discussed in Parliament will be constitutionally viable. Though these notions are more usually viewed as theoretical concepts, this thesis might cast light on how they are understood as practical consequences of the day-to-day communications between judges and politicians.

Judicial-Political Communications and the Constitutional Reform Act 2005

Structurally, the institution of the judiciary is required to be both independent of interference but also dependant on the co-operation between the other branches of government.²⁷ A separation of powers requires distinct branches of government. But it must necessarily follow

content/uploads/JCO/Documents/Speeches/lcj_kenya_clc_120907.pdf); Beatson LJ, *Judicial independence and accountability: pressures and Opportunities*, Nottingham Trent University, 16 April, (<http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/beatsonj040608.pdf>)

²⁷ R Stevens, *Judicial Independence in England: A loss of innocence* (n22); V. Bogdanor, *The New British Constitution* (Oxford: Hart Publishing, 2009), Ch11

that since separation does not equate to isolation by not interacting with other branches, co-operation requires that the individual branches must communicate with each other. This in turn would facilitate an effective and accountable government. In some ways the need to communicate is all the more important after 2005; for example, the considerably expanded roles and responsibilities of the Lord Chief Justice as head of the judiciary instead of the Lord Chancellor, mean that s/he has to communicate with ministers and civil servants on a much wider range of issues (e.g. on judicial appointments, funding for the court, judicial deployment, judicial complaints and discipline). To a lesser, but still important, extent the President of the UKSC also has a wider range of leadership roles than the Senior Law Lord,²⁸ which requires him or her to liaise with ministers and officials. Both the Lord Chief Justice and the President of the UKSC have more responsibilities for the running of the courts, and the UKSC, respectively. Parliament, particularly the Lords Constitution Committee, Commons Justice Committee and Joint Committee on Human Rights, are taking a greater interest in their leadership functions. Parliamentary committees are also keen to understand the broader dynamics of judicial decision-making, the justice system, and legal theory.²⁹ On the one hand, senior judges feel their new roles require them to communicate with the political classes, and sometimes to convey their concerns of policy affecting the administration of justice. And on the other, the politicians are keen to engage with judges over the justice system, and examine the effects of government policies. These are the key foundations of judicial-political communication.

²⁸ The Senior Law Lord was the leading figure of the Judicial Appellate Committee of the House of Lords, before the court became the UKSC at Middlesex Guildhall, in October 2009. For more on the office, see R Cornes, *Gains (and Dangers of Losses) in Translation—The Leadership Function in the United Kingdom's Supreme Court, Parameters and Prospects* [2011] PL 509, 512

²⁹ For examples see a detailed account of judges appearing before Parliamentary committee to give evidence on a variety of issues from 2006 to 2012, in A Le Sueur *Parliamentary Accountability, and the judicial System* in Leyland and Bamforth, *Accountability in the contemporary constitution*, (OUP 2013) Appendix 3

This thesis draws on the desires of both judges and politicians to communicate with each other. Yet both groups continually air concerns cautioning against overly familiar, or constitutionally improper (whether perceived, in appearance, or in fact), channels of communication. When referring to constitutional propriety of judicial-political relations, we see that both judges and politicians rely on, and highlight their commitment to, a separation of powers and judicial independence. This thesis investigates the veracity of these concerns by conducting a study of specific example of extrajudicial communication and questioning the extent of their adherence to the principles of separation of powers, and judicial independence.

A clear example of the importance of communication between the branches of government comes from the way in which some of the changes ultimately encapsulated in the CRA itself were first proposed in 2003. As is well known, there was a complete lack of communication between the executive and the judiciary about the proposed changes—prior to their announcements in the midst of comings and goings of a Cabinet reshuffle in 2003.³⁰ In evidence to the House of Lords Select Committee on the Constitution, Lord Turnbull³¹ was repeatedly examined as to the existence and extent of any consultations on the proposed abolition of the office of Lord Chancellor.³² It quickly became clear that the press release from No.10 was a surprise to many,³³ particularly then Lord Chief Justice, Lord Woolf.³⁴

³⁰ David Atkinson MP, then of the Council of Europe, asserts that there was no connection between the Resolution 1342 *Office of the Lord Chancellor in the constitutional system of the United Kingdom*, on September 8th 2003, and the government press release announcing reform - see Lord Windlesham, *The Constitutional Reform Act 2005: ministers, judges and constitutional change, part 1*, (2005) PL 806, 817

³¹ Senior Civil Servant and from 2002 to 2005 Cabinet Secretary and Head of the Home Civil Service

³² House of Lords Select Committee on the Constitution, *The cabinet office and the centre of government*, 4th Report (2009-10 HL 30) Examination of Witnesses, 1 July 2009, Q138 – 159 (available at <http://www.publications.Parliament.uk/pa/ld200910/ldselect/ldconst/30/30.pdf>)

³³ Press notice, Modernising Government, Lord Falconer appointed Secretary of State for Constitutional Affairs, 10 Downing Street, June 12, 2003

³⁴ Lord Woolf CJ, *Judicial Review--the Tensions between the Executive and the Judiciary* (1998) 114 LQR 579, 582

More importantly, Lord Irvine LC was told only a matter of days before the press release.³⁵

The move was referred to as a ‘curious’ attempt to initiate vast constitutional reform by press release.³⁶

The judiciary were concerned about the proposed reforms—and indeed, so much so, they were moved to hold a special consultation led by Lord Woolf CJ. In the ensuing months discussions took place between the Lord Chief Justice, the Lord Chancellor, the Judges’ Council,³⁷ the Lords Committees, and the Commons, in order to agree the nature of the reforms and wording of the statute. This eventually led to the Concordat referred to above, a result of negotiations between Lord Falconer LC and Lord Woolf CJ, published in the libraries of both Chambers. This concordat stated that the preservation of judicial independence was fundamentally important, and set out other agreed and negotiated sentiments.³⁸ But the concordat came with the condition that it ought to be implemented as a whole.³⁹ Yet it did not deal with the proposal to create a new UKSC, nor with the question as to whether senior judges should continue to sit in the House of Lords. The future of the office of Lord Chancellor had also been excluded on the grounds that these were issues for Parliament to decide.⁴⁰

³⁵ *Lord Irvine Memo Blames Tony Blair*, The Guardian, 1 November 2009, available at <http://www.theguardian.com/politics/2009/nov/01/lord-irvine-sacking-tony-blair>

³⁶ These press releases also detailed some reforms which could be foreseen. For example, the reform of the HL as a legislative chamber. Even the Wakeham Commission in the late 1990s early 2000s contemplated reforms to the upper chamber but while preserving the role of the Law Lords. For a view on this see, Lord Walker, *The new Supreme Court and the changes in the justice system*, (2006) LIM 6(4), 292-296

³⁷ Judges council response to the consultation papers on constitutional reform 2003, precursor of the Judicial College, <http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/judicial/pdfs/jcresp.pdf>

³⁸ Lord Woolf CJ, *The Rule of Law and a change in the Constitution* (2004) 63 C.L.J. 317.

³⁹ *Hansard*, HL Vol.657, cols 12-17 (January 26, 2004).

⁴⁰ Lord Windlesham (n28) at 820

Some other issues which were not properly considered also directly affected the channels of communication between judges and politicians. As noted at the outset of this chapter, the reforms to the office of Lord Chancellor and to the Appellate Committee significantly altered the position of senior judges on the constitutional map of government. The Law Lords were removed from the upper chamber where they once sat as both legislators and judges able to sit in the Judicial Appellate Committee as the highest court in the land. On a more important practical aspect, the removal of the role of the Lord Chancellor as head of the judiciary and the traditional protector of the judges from political intervention, had not been properly considered and no provisions made for replacement.⁴¹ The Lord Chancellor historically made recommendations to the sovereign on judicial appointments. No answers had been given as to who, or what, would replace the mechanism of appointments. Nor, as the Judges' Council paper asserts, had the Government properly considered protection of the independence of the judiciary from political interference.⁴² Since the first press releases, the Government had always insisted that the doctrines of a separation of powers and judicial independence were the focus of the reforms. But it seems that their understanding of implementing a more clear separation of powers equated to isolation and poor communication in a very narrow sense.

The failure by the executive to properly communicate their ideas before implementing them led to protracted discussions, and negative media coverage. But the fact that these failures were followed by negotiation, and subsequent agreement, points to the importance of communication, albeit at a late stage. After the government's initial failure to communicate

⁴¹ Lord Windlesham (n28) at 810. For views on the changes to the duties of the post 2005 office of Lord Chancellor see the differing views of: O'Brien P, *Does the Lord Chancellor really exist?*, UK Const. L. Blog (26th June 2013) (available at <http://ukconstitutionallaw.org>); G. Gee, *Do Lord Chancellors defend judicial independence?* U.K. Const. L. Blog (18th August 2014) (available at <http://ukconstitutionallaw.org>)

⁴² Judges Council Response (n37) at page 7 para 22.

the intention to pursue the reforms, the CRA was born out of an effective and detailed communication between the judicial and political branches.

The process of reform began with little to no consultation. But after the announcement, there were committee appearances, speeches by the Lord Chief Justice in the Lords, and judicial consultation responses, as well as high level negotiations between the government, Lord Falconer LC, and Lord Woolf CJ. Communication was central to conveying the concerns of the judiciary with the effects of the CRA proposals, and more importantly allowed negotiations to occur, to incorporate the changes and safeguards that the judges felt necessary.

Judicial independence requires that the institution of the judiciary be free from interference and the separation of powers requires the business of the branches of government to be separated along the lines of law making, administration and implementation, and application and enforcement. However, these constitutional principles are also dependant on effective communication between the branches of government. More specifically, where the policies of one branch directly or indirectly affect the operation of the other, it is vital that communications take place between the two branches, whilst maintaining independence. Though the process of scrutinising the bill (and accompanying negotiations in private) showed how judicial-political communications could be effective, the result of the CRA has arguably removed what were formerly effective channels of communication.

The Constitutional Reform Act 2005: Shutting Out the Judiciary?

It was earlier suggested that the Blair Government's understanding of a clearer separation of powers equated to isolation, and inadvertently poor co-operation and communication resulted. To put this starkly: in order to establish a separate and distinct judicial branch, the Government thought that the judges should be moved to their own premises, and removed from any business relating to, or conducted by, Parliament or the government, thereby effectively 'shutting out the judiciary'. This narrow understanding of the separation of powers was quickly replaced as judges and politicians began negotiating the terms of the bill. But what evidence is there of a restriction of the channels of judicial-political communication post 2005?

Though initial press-releases spoke of the abolition of Lord Chancellor, the fact is that the office remains today. Its role has been revised in the CRA 2005, with Part 2 of the Act headed 'Arrangements to modify the office of Lord Chancellor'. An important modification of the old role of Lord Chancellor however, was the abolition of the office's responsibilities as head of the judiciary. The office of Lord Chancellor is now seen to be a supplementary title to that of the Secretary of State for Justice. That is, the Lord Chancellor is a government minister, no different to any other minister, and need not be of legal background but merely of qualified by experience.⁴³ After the departure of Lord Irvine, Lord Falconer was made Lord Chancellor and made explicitly clear that, as well as not presiding as a judge in any cases, he felt that he was first, and foremost, a minister of government. This was of great concern to the Judges' Council.⁴⁴ Though there was nothing improper about such an approach, the

⁴³ Constitutional Reform Act 2005, s 2

⁴⁴ Judges Council (n37) p10 para30

Council was concerned that the government had failed to properly consider the consequences of removing the Lord Chancellor as head of the judiciary and the ensuing deficit that the removal of judicial representation from the Cabinet would create. Hazell, however, calls this a typically sad mourning by the judges for their old Lord Chancellor, when in fact the state of judicial independence and propriety has never been stronger.⁴⁵ On this specific point, Hazell must be right; the change from requiring the Lord Chancellor's patronage to independent appointments; and the breaking of a monopoly of different royal prerogative powers in one office holders hand; must all be seen to strengthen judicial independence. But the point remains that the judiciary have been stripped of a voice in the Cabinet. Despite what Hazell calls 'multiple guardians' and legal representatives in the form of the Attorney General, Solicitor General, and Treasury Solicitors Department, rather than a lone guardian in the form of the Lord Chancellor, the judiciary are now without proper representation in the Cabinet or Parliament. No matter how many government posts can be identified as legal in nature or function, all such positions are no different to any other government official or secretary of state—they are politicians. The old office of Lord Chancellor however was markedly different; as head of the judiciary and typically of legal background.

These concerns came to the fore again more recently in January 2013 when Lord Judge gave his final evidence to the House of Lords Committee on the Constitution as Lord Chief Justice.⁴⁶ Lord Judge remarked that the individual independence of the judiciary would not

⁴⁵ R Hazell, Statute Law Society Conference, 15 November 2013 (the speech is publicly unavailable, but the presentation he gave can be found at http://www.statutelawsociety.co.uk/wp-content/uploads/2014/01/Hazell_presentation.pdf)

⁴⁶ House of Lords Select Committee on the Constitution, *Annual Evidence Session of the Lord Judge, The Lord Chief Justice*, Wednesday 30 January 2013, (<http://www.Parliament.uk/documents/lords-committees/constitution/lordchiefjustice/300113LCJtranscript.pdf>)

be an issue—‘we cannot perceive as possible a government official seeking to influence a courts judgement under threat of reduced salary or otherwise’. But the concept of the judiciary as an institution with a constitutional role to play has perhaps been eroded by the reforms of the CRA 2005. Namely, Lord Judge referred to the removal of a judicial personality from the Cabinet. The major concern is that there is nobody in the Cabinet who is responsible for representing to members of the Cabinet how a particular proposal may affect the judiciary. The new means by which the Lord Chief Justice as new head of the judiciary relays any concerns s/he may have is by way of formal indication to the Lord Chancellor. The Lord Chancellor may then, if they agree, raise those concerns in Parliament or the Cabinet. But if they disagree, they may simply discard it. The head of the judiciary is no longer a member of the Lords nor the Cabinet, and is therefore cut off from those institutions which it might necessarily be required to make representations too.

The argument that the channels for judicial-political communication were being restricted under the CRA 2005 was resoundingly rejected by the House of Lords Committee on the Constitution, though without any explanation as to why it thought that.⁴⁷ But if the channels of communication are being so restricted or eliminated, then there will be evidence of alternative means of extrajudicial comment becoming ‘more travelled’.⁴⁸

⁴⁷ House of Lords, Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament* (n26) at para 27

<http://www.publications.Parliament.uk/pa/ld200607/ldselect/ldconst/151/151.pdf>

⁴⁸ Lord Neuberger (n11) At paragraph 34, page 9

Extrajudicial Comment

The Oxford English Dictionary defines ‘extrajudicial’ as ‘[l]ying outside the proceedings in court’.⁴⁹ Extrajudicial comment by judges then is anything done, said or undertaken, whilst not in the formal office of presiding as a judge. There are many interpretations as to what is acceptable and what is not, for judges to undertake extrajudicially. Extrajudicial activities are broad and varied in nature. Judges are often seen making speeches, or engaging in personal activity on the one hand, but also seen to be leading inquiries at the government’s behest on the other. This variety of extrajudicial activity was further explained by Lippman,⁵⁰ who suggested that extrajudicial conduct can be categorised under one of two limbs.⁵¹ The first limb, details the involvement of a judge with formal appointments or assignments arising out of legislative or executive action, such as inquiries or campaigns not within a judge’s regular duty. The second is of a more personal nature, being speeches, lecturing, religious or charitable work, or attending conferences. Within those limbs, there is more scope for interpretation. For example, dependant on the jurisdiction, it may be more or less acceptable for judges to partake and opine on constitutional matters whether inside or outside of their courtroom.

‘Extrajudicial comment’ as above is inclusive of any comment made outside of court by any judge of any court seniority. Such a definition does not restrict the subject matter in form, or substance, or the speaker, and therefore anything said outside of court by any figure otherwise exercising a formal judicial function would be included. As interesting as the

⁴⁹ OED (2d ed. 1989) 613

⁵⁰ J Lippman, Chief Judge of the State of New York and Chief Judge of the Court of Appeals (2009–present).

⁵¹ J Lippman, *The Judge And Extrajudicial Conduct: Challenges, Lessons Learned, And A Proposed Framework For Assessing The Propriety Of Pursuing Activities Beyond The Bench*, (2012) 33 Cardozo L. Rev.1341

thoughts of the judiciary on otherwise more humorous or mundane matters would be, the definition of ‘extrajudicial comment’ here will need to be delineated to a more restricted scope in terms of speaker, form and substance. The substance can be restricted to those comments made relating to, regarding, or observing the state of the law or government, or the functions of the judiciary or the process of the administration of justice. That is extrajudicial comments which are legal in nature or pertain to legal matters, or the state of law or government. This should exclude comments of a non-legal or non-political nature which might otherwise relate to religion or charity. In choosing extrajudicial speeches and oral evidence to Parliamentary committees, we limit the form of extrajudicial comments to include in our study. This also implies that the extrajudicial comments studied will be public comments. Limiting the definition of extrajudicial comment in terms of the speaker is more appropriately done at the start of chapter two.

There are a variety of options for judges to comment extrajudicially: public speeches; reports and consultations from the Judge’s Council; journal articles; evidence to Parliamentary committees; annual reports; public inquiries; press conferences; interviews; off-the-record briefings and blogs. Private judicial-political discussions also occur (for example between the Lord Chief Justice, the Attorney General, Lord Chancellor, Cabinet Secretary and annually with the Prime Minister),⁵² but this thesis focuses on more formal public comments. This is because where private communications falter or fail, judges will sometimes turn to public communication as a means of last resort.⁵³

⁵² “These include monthly meetings with the Lord Chancellor and, in a fairly recent innovation, twice yearly meetings with the Prime Minister. As and when serious concerns arise, the LCJ can request an extraordinary meeting with the PM” G Gee, *The Lord Chief Justice and Section 5 of the Constitutional Reform Act*, UK Constitutional Law Blog, Entry 14 April 2014

⁵³ Examples of this include Lord Philips speaking in 2011 on the damage to the independence of the Supreme Court so long as the MOJ and not the SC President appoints the Chief Executive of the Court. (the speech can seen at <http://www.ucl.ac.uk/constitution-unit/events/judicial-independence-events/lord-phillips-transcript.pdf>)

Where a judge feels private communications have been unsuccessful, a speech may do more to draw wider public attention to the issues at hand, and force more productive communication. Significantly extrajudicial speechmaking and oral evidence are not isolated channels of communication. For example a speech may come to the attention of a Parliamentary committee, which may then decide to call the judge concerned to give evidence to elaborate on their thoughts. These thoughts could then end up in explanatory papers or committee reports to members of Parliament and quoted in Parliamentary debate. These communications are also sometimes a trigger for further discussion or debate in Parliament, or a continuation of a debate over current issues. This close relationship between oral evidence and speechmaking is another reason why they are the focus of this thesis.

This investigation involves a comprehensive study of extrajudicial speeches and oral evidence to Parliament. The reasons for singling out these means of extrajudicial comment will become clear. Briefly these are; that guidance has been issued to judges whether historically, formally, informally or currently in effect on how judges should approach extrajudicial speeches and oral evidence; secondly, today extrajudicial speeches and oral evidence are the most prominent, public and well known means of communication; thirdly they also represent a means by which, in the case of speeches, indirectly and one-sidedly allows for an interaction between judges, Parliament, and the government, allowing an investigation into concerns over the separation of powers and judicial independence.

CHAPTER TWO: EXTRAJUDICIAL SPEECHES AND LECTURES

Chapter one showed how the CRA reforms have made judicial-political communication more important, but that the avenues for such extrajudicial interactions are now fewer. This and the next chapter looks at why extrajudicial speeches and oral evidence to Parliament can be considered the most significant means of extrajudicial comment, respectively. This chapter focuses on the evolution of speechmaking from educational purposes, to a method for judges to communicate with Parliament and the government. To do this the chapter is in two parts. In Part A, I begin by identifying a number of judicial speeches that will form the focus of my study. I then reflect on the guidance that exists to regulate extrajudicial speechmaking. Part A concludes by outlining criteria for analysing extrajudicial comments as means of communication. In Part B, I classify the selected speeches according to the criteria set out in Part A. Our study of the historic development of, and current guidance to, judges on speechmaking in Part A feeds into the process of classification and analysis in Part B. An important reason for this is to see whether or not the output and content of speeches follow the patterns and considerations envisaged by the guidance. Importantly, this will allow a study of the means by which judges can and have currently made extrajudicial speeches, which have been intended as indirect communications to Parliament and/or the government.

Part A: Extrajudicial Comments from the Senior Judiciary

We saw in chapter one that one effect of the CRA 2005, was to restructure the leadership duties and responsibilities of senior judges. Much of the administrative responsibility for the running of the judiciary was transferred from the Lord Chancellor to the Lord Chief Justice, who was also made the new head of the judiciary in the Lord Chancellor's place. The Law

Lords are also a focus of the CRA, being removed from the House of Lords and installed in a new UKSC building with a President and Deputy President, with a final say over that court's administration.⁵⁴ Without an elected representative body or figurehead, the office of the Lord Chief Justice remains one of esteem and respect and is statutorily the head of the judiciary.⁵⁵ As head of the judiciary, the Lord Chief Justice also has new responsibilities for the administration of the courts, formerly held by the Lord Chancellor. Given the increased responsibilities and duties, the Lord Chief Justice has felt it necessary to delegate some of these responsibilities to heads of divisions.⁵⁶ Heads of divisions too, responsible for the budgets and administration of their divisions, will need to communicate with ministers and civil servants on these issues. Likewise the Justices of the UKSC are considered to be senior members of the judicial hierarchy, as members of the highest court in the land. With the creation of the UKSC, the President in particular has undertaken new responsibilities for directing the courts approach to budgeting and administration of the UKSC.

When selecting a sample of judicial speeches to examine in this thesis, it is necessary to set the boundaries narrowly and to include only the most senior and leadership elements of the judiciary—especially those with new leadership responsibilities as discussed above. This ensures that this thesis focuses on what is said from those at the top of the hierarchy who have arguably been affected most of all by the CRA 2005. These senior judicial leaders are,

⁵⁴ For a detailed account of the responsibilities of the JSCs, and the SC Chief Executive, see K Malleson, *The Evolving Role of the UK Supreme Court* [2011] PL 754. See also, a study of the responsibilities of the leadership figures across the UK judiciary, and discussion of their relative importance to, and over, each other in R Cornes, *Gains (and Dangers of Losses) in Translation—The Leadership Function in the United Kingdom's Supreme Court, Parameters and Prospects* [2011] PL 509, 517.

⁵⁵ Constitutional Reform Act 2005, S.7(1)

⁵⁶ A move anticipated in the CRA 2005 in schedule 5 of the Act, granting power to the LCJ to delegate in this way. Delegation has also been discussed in oral evidence before Parliamentary committees – see House of Lords Constitution Committee, Annual Oral Evidence of Lord Thomas CJ, May 2014, available at <http://www.Parliament.uk/documents/lords-committees/constitution/annual%20oral%20evidence%20sessions%202013-2014/ucCONST070514Ev1LordThomas.pdf>

after all, charged with a special responsibility for the maintenance and advancement of the judiciary. Because of these new responsibilities for administration and budgeting we can expect to find, as discussed in chapter one, an increase in judicial-political communication in a way not seen before. In summary, for these purposes 'extrajudicial comments' will be taken from the senior judiciary which includes the Lord Chief Justice, justices of the UKSC and formerly the House of Lords and Heads of Divisions of the Court of Appeal

There are possible shortcomings from setting the parameters so narrowly. In restricting the study of extrajudicial comment to the political and legal comments made in oral evidence and extrajudicial speeches, there is a strong chance that comments of neither type, but still relevant to the judicial institution and its administration, will be discounted. For example, there is comment on the issue of court and MoJ funding from the senior judiciary in responses to consultations and annual reports, which discuss the consequences of these policies on access to justice etc. These are significant forms of communication, but as they cannot be attributed to a single identifiable judge and analysed critically using the system that will be suggested later in this chapter, these are also discounted. In excluding these wider consultations and reports, the collective discussion on the issue of funding and court access which has only come about as a result of the CRA 2005 will not be included. However this thesis will not look at all the effects of the CRA on the judicial institution.

By limiting the scope to the senior judiciary as defined in this way also omits comments from Chief Magistrates, Resident Judges and Honorary Recorders. Their thoughts are no less valuable and they still occupy leadership roles, albeit of a lesser significance for shaping the overall tenor of judicial-political communications. Including these groups in the study would be to include 'the middle level' of the judiciary, responsible for the day-to-day conduct inside

their own local court buildings, not nationally representative of the judiciary as with senior judges. It is on this national scale that the importance of communication between the branches of government can be discovered.

To summarise then, the focus of this thesis is on the senior judiciary, and the particular definition as set out above. Secondly, only comments relating to the law or government or of a legal or political nature are included as explained at the end of chapter one. Working according to these parameters should draw the sample in to a suitable and workable size to allow for an investigation into the extrajudicial comments made by nationally representative judges, with leadership responsibilities, which require communication with the political classes.

A Brief History of Regulating Extrajudicial Comment

The rules surrounding extrajudicial comment-making may frame the content of extrajudicial comments because of the way the rules limit what judges can and cannot comment on. It is therefore necessary to analyse the development of rules regulating extrajudicial comment, before identifying our sample of speeches in Part B.

The Kilmuir Rules, introduced in 1955 by then Lord Chancellor Lord Kilmuir, were based on the idea that ‘so long as a judge keeps silent his reputation for wisdom and impartiality remains unassailable’. These measures were not introduced as a reaction to a scandal or serious matter. The trigger was in fact brought about by the British Broadcasting Corporation (BBC). When making a documentary about great judges of the past, the BBC asked the then

Lord Chancellor for permission to interview judges. In a written response Lord Kilmuir stated:

‘...every utterance which [a judge] makes in public, except in the course of the actual performance of his judicial duties, must necessarily bring him within the scope of criticism. It would moreover, be inappropriate for the Judiciary to be associated with any series of talks or anything which could be fairly interpreted as entertainment. My colleagues and I, therefore, are agreed that as a general rule it is undesirable for members of the Judiciary to broadcast on the wireless or appear on television.’

The rules were essentially a blanket ban on judges making extrajudicial comment to the media, and more generally ensured that the Lord Chancellor alone would speak for the institution.

In setting aside the Kilmuir Rules in 1987, Lord Mackay stated ‘[j]udges should be free to speak to the press, or television, subject to being able to do so without in any way prejudicing their performing of their judicial work. ...It is not the business of the Government to tell the judges what to do.’⁵⁷ This was more forcefully restated by Mason.⁵⁸ The essence of Mason’s argument was that on taking the judicial oath, a judge does not lose the right to freedom of speech. But it is the very nature of the office that demands that limits be observed in order to maintain the reputation and proper functioning of the judicial officer holder, and the institution as a whole. The freedom for the judiciary to make extrajudicial comment

⁵⁷ Lord Mackay of Clashfern November 1987 as referred to in G Rubin, *Judicial Free Speech versus Judicial Neutrality in Mid-Twentieth Century England*, (2009) LHR 27(2), para 64.

⁵⁸ Former President of the Court of Appeal of New South Wales Mason, *Should Judges Speak Out*, JCA Colloquium, Uluru, 9 April 2001, (available at <http://jca.asn.au/wp-content/uploads/2013/11/mason2.pdf>)

exists, but it is caveated. In practice balancing the oath with the rights to freedom of speech requires judges to question firstly the scope and limits of when a judge should speak; and secondly, consider the necessary caution to consider properly whether one should choose to speak, and if so, how so.⁵⁹ These considerations are looked at more closely in chapter four.

In a recent speech on the subject of extrajudicial comment, Lord Neuberger revisited the same subject.⁶⁰ During the course of his speech, Lord Neuberger was reported in the media as having reprimanded a member of the judiciary for making comments on MasterChef.⁶¹ Yet on reading the speech itself, the context is clear; Lord Neuberger sought to show the absolute strict nature of the thinking of Lord Kilmuir in preventing any public comment at all.⁶² The efforts of the media to ‘spin’ should certainly serve to caution any attempt to humanise the judges. Lord Neuberger used his speech to address the subject of whether or not the Kilmuir Rules ought to be introduced. He concluded that whilst this was not necessary, and while acknowledging that extrajudicial comment should be viewed positively, vigilance was nevertheless essential. Such vigilance in making extrajudicial speeches is essential for the preservation of core principles such as judicial independence and the separation of powers.

The Kilmuir Rules, used these principles to argue for the restriction of judicial comment almost altogether. The separation of powers forbade judges from engaging in political matters, and it is widely believed that judicial independence was better served by silent judges, who would therefore always be perceived as impartial. Yet when justifying the abolition of

⁵⁹ L McNamara, *Judicial Perspectives on open justice and security, Justice Wide Open* (Ed. Judith Townend), (20 June 2012)

⁶⁰ Neuberger (n11)

⁶¹ “Lord Neuberger criticises fellow judge for appearing on MasterChef” Telegraph 12 March 2012

⁶² Neuberger (n11) para 8

the Kilmuir Rules, Lord Mackay argued that it was precisely because of judicial independence that judges should decide for themselves whether to speak. What has remained constant throughout the period from Lord Kilmuir to Lord Neuberger's speech in 2012, is the absolute prohibition on comment by judges on matters of policy (or at least, matters of policy not pertaining to the administration of justice, as Lord Neuberger asserted in his defence of Lady Hale's speech on the legal aid cuts). These changes in rules, suggest that the understanding of judicial independence has also changed within the judiciary.⁶³ From the more formal concepts, judicial independence is increasingly accepted as having an institutional as well as an individual limb. This is relevant in as much as a comment by one judge might damage the independence of the judiciary as a collective which, as we discussed in chapter one, must be free from interference, above reproach, and impartial. Changes such as these, in the understanding of judicial independence (and by extension the separation of powers as well), could be taken to suggest that the judiciary's understanding of effective channels of communication might also be changing.

Changing Guidance to Judges on Extrajudicial Speechmaking

In order to justify selecting extrajudicial speeches for study, over other forms of public communication, it is necessary to look at the historical approaches taken to extrajudicial speeches in this chapter—from the Kilmuir Rules and their restrictive effect, to their eventual dismissal, and Lord Neuberger's more recent suggested guidance.

⁶³ See the explanation given by M Arden LJ, a senior court of appeal judge (n16)

Neuberger singled out modern examples which flagrantly contravene the Kilmuir Rules, such as the appearance and comments of judges on MasterChef.⁶⁴ However, having already delineated the relevant extrajudicial comment for the purposes of this thesis as those relating to the clash between politics and the law (which may or may not threaten the independence of the judiciary), any comments of ‘entertainment value’ should not be of concern. Whilst limiting judges, the Kilmuir Rules did not go so far as to include the senior judiciary who then also sat in the lords. As members of the upper chamber the Law Lords had a means by which to make their voices heard in the chamber and in government. The Kilmuir Rules did not limit their right to speak in the Lords. Even so, by convention few presiding judges took part in controversial debate in the chamber.⁶⁵

Similarly, in restricting judges from partaking in events with entertainment value, it seemed that extrajudicial speeches were overlooked by the Kilmuir Rules (though that does not necessarily mean that the judge speaking cannot be entertaining). Lord Neuberger gives a brief attempt to classify these speeches as typically ‘safe’ subjects, on matters such as the rule of nuisance in *Rylands v Fletcher*⁶⁶ i.e. educational speeches of educational value, on points of law and legal theory.⁶⁷ In this classification, Lord Neuberger identifies exceptions to the ‘safe’ subjects of educational value. An example comes from Lord Scarman and his comments at the Hamlyn lecture, *A New Dimension* 1974.⁶⁸ In 1974 the ECHR and its possible incorporation into English law was a salient topic for discussion. But as Lord Neuberger

⁶⁴ Neuberger (n11) para 7

⁶⁵ While Lord Neuberger acknowledges this, he also gives some significant examples of the few instances where that was not observed, see Neuberger (n11) para 22

⁶⁶ (1868) LR 3 HL 330

⁶⁷ Neuberger (n11) para 14. The Neuberger Principles are fully set out at 46 to 54

⁶⁸ See Scarman LJ, *English Law – A New Dimension, Hamlyn Lectures, 26th Series*, (Stevens & Sons Publishing 1975)

http://socialsciences.exeter.ac.uk/media/universityofexeter/schoolofhumanitiesandsocialsciences/law/pdfs/English_Law_the_New_Dimension.pdf

notes, Lord Scarman did not just discuss the issue. Instead ‘he offered his conclusion on how that debate should be resolved’. Lord Neuberger perhaps feels that this was too far.⁶⁹ Here, the significance of extrajudicial speeches and their evolution for new purposes comes to light.

Lord Neuberger acknowledges the reasoning of Lord Mackay in setting the rules aside, but appears to differ in his approach to extrajudicial comment in the form of speeches. As with Lord Kilmuir, Lord Neuberger was concerned with judicial independence, both individual and institutional, as discussed in chapter one. But these concerns were in two parts for Lord Neuberger. He observed that independence ‘can be compromised through the judiciary being drawn into discussions with the executive and legislature, which, for instance, call on the judiciary to offer legal advice, to comment on the lawfulness or constitutionality of policy or proposed legislation’. It can also be compromised where a judge may speak out of turn, on an issue of controversy which s/he will later need to rule upon in court. In such instances, the independence and impartiality of the judge concerned is compromised and they must recuse themselves. It is clear that either compromising action envisaged by Lord Neuberger may take place in direct oral evidence to a Parliamentary committee, or through an indirect public lecture. This is a further reason why these two modes of extrajudicial comment are so important, and worthy of study.

More specifically on extrajudicial speeches, we saw how even during the Kilmuir years extrajudicial speeches were seen as exceptions to stringent restrictions of what senior judges could say. Now with those rules set aside, and the effect of the CRA 2005 on removing judges from the lords, Neuberger seems credible when he asserts that ‘the remaining avenues

⁶⁹ Neuberger (n11) para 15

are almost inevitably likely to be more travelled'. Neuberger acknowledges this, and surmises that extrajudicial speech 'carries with it more benefits than drawbacks'. This leads him to conclude that 'at their best, extra-judicial comments in speeches and lectures help to maintain that independence; at their worst they risk undermining it. That is why vigilance is needed'.

The Neuberger Principles: Suggested Guidance

Lord Neuberger concluded by setting out seven principles to guide judges in that vigilance.

In summary these state:

- First, perhaps the most valuable contribution from judges speaking extrajudicially is on matters drawing upon their own experiences and knowledge in an educative role on matters of the law, as an academic subject as well as a career and profession.
- Second, any comment should be made following careful consideration of the impact which it might have on both aspects of judicial independence—the individual, who may later need to rule on the issue in court, or the institution.
- Third, a judge should consider the effect of speechmaking on the judiciary generally. That is, judges should consider that their opinions may be disagreed with, and not held by the judiciary as a whole. Where such views may inflame relations within the judiciary, they should perhaps not be made. Where disagreements occur, they should be conducted in a 'seemly manner'.
- Fourth, a judge should consider whether the subject matter is inconsistent with the separation of powers and goes too far into matters of public policy. Where these 'trespasses' cannot be defended as necessary and relating to the administration of

justice they should not be made. The same considerations arise when members of the executive or legislature seek comments from serving judges. ‘Comity and the separation of powers may well call for reticence’.

- Fifth, judges should think carefully of their audience, and the impact their comments might have upon it, and upon any wider audience, including the media. Might such comment compromise the judge’s independence, or be a matter upon which the judge may later be called upon to rule? Where such comments are made, ‘care should normally be taken to make it clear that the judicial mind is not closed’.
- Sixth, judges should ensure that they do not seek publicity for its own sake, or use their ‘office as a springboard for causes (however worthy)’.
- Seventh, Lord Neuberger expressed concern at the number of speeches being made and wondered if it devalued the importance of extrajudicial comment.

These seven principles are not only ironic—advising caution to judges when speechmaking, by making a speech—but are also a significant indication of another possible change in judicial attitude to judicial communications. We noted earlier that judicial-political communication will inevitably have increased as a result of the CRA reforms (because, for example, of the heightened administrative responsibilities of senior judicial leaders). Whilst acknowledging that an increase will occur, Neuberger is however cautious that this should not be viewed as an opportunity for judges to depart from convention and constitutional principles, by making comments on issues which remain inappropriate to comment upon. The Neuberger principles therefore restate compendiously the existing principles and conventions that Neuberger believes should be uppermost in a judges mind before speaking.

For these reasons, the Neuberger principles are a helpful way to better understand a judges mind set when speechmaking and for the purposes of this thesis are given normative weight. This also allows an investigation into whether or not speeches really do fall within these principles, that we reasonably expect judges to consider and follow albeit by convention, during the classification process.

Part B: Classification Process

In order to assess the value of this guidance, speeches will need to be selected for our sample, and then organised according to a classification model. This classification is done substantially in three parts—the speaker (the judge doing the talking), form (in terms of the mode, venue, and context of the comments) and substance (the purpose and content of the comments). Looking at the speaker or the maker of the extrajudicial comment identifies who is speaking, the frequency with which that judge makes comments extrajudicially, and whether a certain ‘type of speech’ might be expected from them as regards topic or substance. This is important to the classification process in drawing out trends and projections of extrajudicial comments since the CRA 2005—and more specifically whether patterns have changed and judges are speaking out more often.

The form of the extrajudicial comment, looks at more than whether it is a speech, lecture, or comes in oral evidence. This also sets out the venue where the communication took place, and what can be drawn from that. It also looks at who is in the audience (intended and actual) to receive the opinion or words of the judge and why the judge and the audience might be there. This is not a simple exercise where a judge need only decide whether to blog about a topic, or make a speech or write an article. The chosen method will allow a judge to target a

particular audience. Judges may also be ‘invited’ to give a lecture. These are very much a mode or method for extrajudicial comment, and therefore allow for extrajudicial comment to be easily classified by the form in which the contribution appears. However, the form of an extrajudicial contribution says little, if anything, about the substance of the extrajudicial comment. How the judge makes their opinions heard and presents their thoughts will set the premise for deeper analysis in terms of substance. For the purposes of this thesis the selected speeches will be drawn from those given before non-political audiences. As will be made clear through the analysis later in this chapter, the main reason for this is because my research suggests that (whether intentionally or not) speeches before academic institutions, and more so legal professionals, attach greater significance to the views and opinions of judges and an increased likelihood to lead to press reporting. Since my central research question requires evidence of judges using alternative and indirect means to communicate their views, this limitation is essential.

The final category looks at the substance of the extrajudicial comments. This studies the actual content of the comments; what is the judge saying and, more so, why is the judge saying it? It may also be that the intended audience differs from the actual audience, when we look at substance.

Speeches

In order to explain and reason this process of classification it is necessary to draw on actual examples of extrajudicial speeches. Lord Judge took office as Lord Chief Justice in October 2008 and retired in September of 2013. He made at least twenty documented speeches during that time. Since the opening of the UKSC in October 2009, the justices of the UKSC have

collectively made at least eighty one extrajudicial speeches.⁷⁰ Of the speeches by Lord Judge and JSCs, five have been selected for classification in line with the approach outlined above. The sixth speech comes from Potter LJ, who served as President of the Family Division at a time when government policy was very much concerned with reforming the family justice system. The detail of this is discussed later.

The speeches in the sample are:

1. Lord Judge CJ, Judicial Independence and Responsibilities, 16th Commonwealth Law Conference, Hong Kong, 9th April 2009;⁷¹
2. Lord Phillips, Judicial Independence, UCL Launch of 'The Politics of Judicial Independence' research project, 8 February 2011;⁷²
3. Lord Neuberger, Judges and Policy: A Delicate Balance, Institute for Government, 18 June 2013;⁷³
4. Lord Hope, Lord Taylor CJ Memorial Lecture, Inner Temple, 23 April 2013;⁷⁴
5. Lady Hale, Equal Access to Justice in the Big Society, Law Society, June 2011;⁷⁵ and

⁷⁰ For the speeches by Lord Judge, with links to the content, see <http://www.judiciary.gov.uk/media/speeches/speakers/lord-judge>
Further as of February 2013, the list of the JSCs speeches, with links to the content, can be found at <http://supremecourt.uk/news/speeches.html>

⁷¹ Lord Judge CJ, <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lcj-jud-independence-resps-hong-kong.pdf>

⁷² Lord Phillips, http://www.supremecourt.uk/docs/speech_110208.pdf

⁷³ Lord Neuberger, <http://supremecourt.uk/docs/speech-130618.pdf>

⁷⁴ Lord Hope, <http://supremecourt.uk/docs/speech-130423.pdf>

⁷⁵ Lady Hale, http://supremecourt.uk/docs/speech_110627.pdf

6. Sir Mark Potter LJ, President of the Family Division, Hershman/Levy Memorial Lecture, the Association of Lawyers for Children, London, June 2009.⁷⁶

The speeches were chosen because they are from some of the most senior judges, who are in order: the recently retired LCJ; former SC President and current President; former Deputy President, and current Deputy President of the UKSC; and, until retirement in 2010, President of the Family Division.⁷⁷

Speakers

The first speech was given by Lord Judge, during his time as LCJ. Although Lord Phillips was the first post-CRA LCJ, Lord Judge was, in many ways, the key actor in developing the post-2005 office of LCJ and, more generally, working to make sense of the new constitutional landscape.⁷⁸ We might surmise that the new responsibilities, and any problems or issues faced by Lord Judge with them, are likely to come across in his extrajudicial comments. In this speech, Lord Judge sets out the meaning of judicial independence and its importance not just for judges but also its great significance to a democratic society and the rule of law. Lord Judge does this with a catalogue of examples where judicial independence has been

⁷⁶ M. Potter LJ <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/pfd-hershman-levy-lecture.pdf>

⁷⁷ A list of all speeches by JSCs can be found at <http://www.supremecourt.uk/news/speeches.html>

⁷⁸ Lord Woolf CJ was the first LCJ to become head of the judiciary by virtue of s.7(1) of the CRA. He was succeeded by Lord Phillips in the same year. But, arguably, the full extent of the transfer of administrative responsibilities had not been completed until the MoJ reforms of 2007. For more on those reforms see: House of Commons Constitutional Affairs Committee, *The creation of the Ministry of Justice*, Sixth Report of Session 2006-07, HC 466 available at <http://www.publications.Parliament.uk/pa/cm200607/cmselect/cmconst/466/466.pdf>; AW Bradley, *Relations between Executive, Judiciary and Parliament: an evolving saga?*, (2008) PL 470, 481

subverted, and outlines the responsibilities for judges that come with independence, and the duty of non-interference from the executive.

The second speech is taken from Lord Phillips as President of the UKSC in 2011 where he addressed the UCL School of Political Sciences on the launch of a research project on judicial independence. The UKSC website lists three speeches made by Lord Phillips as President from 2009 to 2011.⁷⁹ Lord Phillips was the first President of the UKSC, and we can therefore expect some of his comments to reflect the work of, and challenges confronting, the UKSC in its first few years. In this speech Phillips sets out his own views on the development of the doctrine of judicial independence through history into its current form. He also studies and reflects on CRA reforms and their consequences for judicial independence. In particular, Lord Phillips refers to the proposed funding arrangements of the UKSC when the CRA was being drafted, the actual funding arrangement, and his concerns about the disparity between the two.

The third speech in the sample is by Lord Neuberger. As current President of the UKSC, he is considered one of the most senior judges in the land, as the most senior figure of the Supreme Court. As President of the UKSC he is responsible for directing, and is authoritative on, matters relating to the UKSC. Since taking office in October 2012, he has made ten extrajudicial speeches. Of those, two took place at think-tanks,⁸⁰ four before bodies representing branches of the legal profession in practice,⁸¹ and one at annual conferences of

⁷⁹ The three speeches by Lord Phillips can be found at <http://supremecourt.uk/news/speeches.html>

⁸⁰ The speeches by Lord Neuberger are: Lord Neuberger at Justice – Tom Sargant Memorial Lecture 2013 Justice in an Age of Austerity and Lord Neuberger at the Institute for Government, Judges and policy: a delicate balance 18 June 2013

⁸¹ Lord Neuberger at the ARBRIX Annual Conference, London Address to property arbitrators 12 November. Lord Neuberger gives The Annual Caroline Weatherill Memorial Lecture, Isle of Man The Judicial Committee of the Privy Council in the 21st Century 11 October 2013, Lord Neuberger gives the inaugural Harbour Lecture at Gray's Inn From barrety, maintenance and champerty to litigation funding 8

organisations providing a legal service or function.⁸² The topics of these speeches vary from the purely educational such as 'fraudulent claims' to reform of legal education, and also political issues such as 'judges and policy: a delicate balance'. In the speech selected for study here, Lord Neuberger discusses how he has seen the relationship and state of separation of powers evolving, and where the right balance for good government might lie. Applications for judicial review, which seek to hold public bodies to account, rose from 6,692 in 2007 to 11,359 in 2011.⁸³ In recent years it has become increasingly common for parts of the media and political class to suggest that the judiciary has overstepped their judicial function into the political arena, by creating for itself a much greater policy role. With the growth of judicial review, the advent of human rights, and the UK's membership of the European Union being cast into doubt, the subject of Lord Neuberger's speech is very relevant, but also somewhat political. Lord Neuberger begins by acknowledging the growth of the courts judicial review work, but adds: '[t]he growth of judicial review, since the 1960s, reflects the significant expansion of the power of the executive'. The debate in the media and Parliament has also recently discussed reform of the judicial review process in light of the increasing number of claims, and discussed the increase of legal costs for the claimant requesting judicial review.

The fourth speech is by Lord Hope, who served as Deputy President of the Supreme Court, and who, since taking office in October 2009, has made thirteen extrajudicial speeches. Having been in the UKSC for three years longer than Lord Neuberger the difference

May 2013 and Lord Neuberger at the '80 Club', Association of Liberal Lawyers 'Tomorrow's Lawyers Today - Today's Lawyer's Tomorrow' 19 February 2013 and Lord Neuberger at the UK Association of Jewish Lawyers and Jurists' Lecture Privacy in the 21st Century 28 November 2012

⁸² Lord Neuberger gives the first annual BAILII Lecture, No Judgment – No Justice, 20 November 2012

⁸³ BBC article covering the rise in applications for judicial review: *Ministers line up curbs on 'frivolous' judicial reviews*, BBC 23 April 2013 <http://www.bbc.co.uk/news/uk-politics-22260063>

between Lord Hope's thirteen speeches in four years and Lord Neuberger's ten in one year is significant. The difference is most likely a reflection of the importance of the office of President of the UKSC—whether the authority of the President's comments, or simply an indication of the high demand to have Lord Neuberger present at a venue we shall see. Of those speeches by Lord Hope almost all took place at places of education or research including law schools and law centres. The topics vary from the need and functions of the UKSC, to issues in Scots law, and contract law. The selected speech here is based on the legal theory and discussion of the Supreme Court judgment given by Lord Phillips in the recent case of *Various Claimants v Catholic Child Welfare Society*.⁸⁴ This case and Lord Hope's speech addressed the issue of child sex abuse cases as claims brought before the civil courts, and not the issue as seen in the criminal courts. Cases of this sort relate to child sex abuses where at the time of the commission of the offence the victim was in the care of a school, orphanage or institution, where the offence took place, by a member or employee of the institution concerned. The victim then brings a claim for damages in the civil courts against the institution where the offence was carried out. The question for the court is whether the institution is vicariously liable for the commission of the offence by the offender. The usual requirements for vicarious liability were whether what the offenders did was within the scope of their authority, whether there was a close connection between wrongful acts and the type of work being performed, and whether it would be fair and just to hold the offender's institution liable for the offender's wrongful acts. However the test in the UKSC case was not so straightforward since, in very basic terms, the offenders in that case were priests of a brotherhood, committing these offences whilst working at a child welfare organisation, which did not employ them. Lord Hope sets out the recent high profile cases on similar facts

⁸⁴ [2012] UKSC 56, [2012] 3 WLR 1319

and the judgments in those cases, and then explains how the precedents on vicarious liability were ‘tailored’ by the court led by Lord Philips to find the child welfare organisation in that case liable.

The fifth speech in sample is taken from Lady Hale, who recently replaced Lord Hope as Deputy President, but has otherwise been a member of the UKSC for the same time period as Lord Hope, since its opening in October 2009. Lady Hale has in that time made twenty one extrajudicial speeches. The majority relate to family law and diversity in the judiciary. At the time of the chosen speech, the Legal Aid, Sentencing, and Punishment of Offenders Bill had just been published and was due for debate in Parliament. Among its provisions it included reforms to legal aid and cuts to the provision of legal aid. Lady Hale’s speech is an examination of these reforms and the impact and effect of them on ‘access to justice’. She explains that article 6 of the ECHR protects the right of access to the courts, and this is ‘one of the most precious’ of our constitutional rights. The speech goes on to suggest that reform is not forbidden, and that different possibilities for saving money in the court system can be found.

The final speech was given by Potter LJ as President of the Family Division; a division which has faced not only stringent cuts, but also the proposed privatisation of many of the social and child care services which it uses. Potter LJ has made thirteen speeches on the subject during his time in office.⁸⁵ At the time of this speech in 2009, the government proposed specific cuts to legal aid in family proceedings and proposed the award of contracts for social

⁸⁵The list of speeches can be viewed at: <http://www.judiciary.gov.uk/media/speeches/speakers/sir-mark-potter>

and family child care work to private companies.⁸⁶ Following serious criticism of the government's proposal by legal professionals, and negative media coverage, the government showed no sign of relenting. As head of the family division, Potter LJ states that he has a duty to speak out in defence of the family justice system. During the selected speech, he gave his view of the detrimental effects of the proposed cuts, and the possible consequences thereof, making clear his opposition to the proposals.

These judges are plainly very senior and respected members of the judiciary. Yet, it is clear that Lady Hale is the most likely to speak out, having done so on markedly many more occasions, several of which have been widely reported as we will see. One view would be that we can expect Lady Hale to express her right to speak publicly and to do so on matters she views to be important more often than Lord Hope or Lord Neuberger. But it would also be prudent to consider that a judge is not solely responsible for where they speak or how many times they do so. On many occasions it is undoubtedly the organisation hosting the lecture that will select and invite a judge to speak. This explains more clearly how Lord Hope attends and speaks at more events in Scotland on Scottish issues than the other two JSCs. And perhaps it can also be asserted that the greater frequency of Lady Hale's speechmaking could be due to the fact that she is popular among hosts, professionals and students.

It seems then that the first step of identifying the speaker, and looking into their background and history of extrajudicial speeches is relatively straightforward compared to the next two classification stages. But doing so provides a good basis from which to see which of our

⁸⁶ For media coverage of the privatisation see: *Families 'hit by legal aid cuts', Law Society warns*, 7 August 2010 <http://www.bbc.co.uk/news/uk-10900573>

speakers are more ‘outspoken’ than the others, speak more often, and speak on different topics.

Form

The form of the extrajudicial comment is already known; the sample is of six speeches. We should also be aware of the guidance from Lord Neuberger above. Specifically at point five where attention is drawn to the potential concerns over the audience before which extrajudicial comments are made. Here we should be aware of what the audience, or those who issued the invitation to the relevant judge to deliver a speech, might also hope to achieve by having a senior judge attend to speak.

The first speech in our sample by Lord Judge CJ, took place at a Commonwealth law Conference held in the non-commonwealth jurisdiction of Hong Kong. The over 1000 anticipated attendees of the conference were members of the Commonwealth Lawyers Association which draws its membership from across the commonwealth nations.⁸⁷ Fellow speakers alongside Lord Judge included ministers for justice and senior judges from other commonwealth nations.⁸⁸ This is therefore the only speech to an international audience, and to a sizeable audience, in our sample, though other judges have addressed international audiences (for more examples, Lord Mance delivered speeches in Monaco⁸⁹ and the

⁸⁷ The composition of the association can be viewed at <http://www.chinalawandpractice.com/Event/818/16th-Commonwealth-Law-Conference.html>

⁸⁸ The event can be viewed at <http://www.commonwealthlawyers.com/conferences.aspx#TOC>

⁸⁹ Lord Mance in Monaco, *Destruction or Metamorphosis of the Legal Order?* 14 December 2013 - <http://supremecourt.uk/docs/speech-131214.pdf>

Netherlands⁹⁰ in 2013, and Lord Sumption in Kuala Lumpur also in 2013).⁹¹ With such an international audience and particularly comprising the commonwealth legal professionals, we might expect Lord Judge to be less specific to the state of British law and affairs, and speak a little more generally so as to be relevant to all commonwealth nations. The most obvious way we might expect Lord Judge to do this is by taking a fundamental legal principle and speaking about it in relatively abstract terms, as indeed he does in this selected speech.

Lord Phillips speaking at the University College London for the launch of the Judicial Independence Research Project, 8 February 2011, and in a speech entitled 'Judicial Independence' can be expected to give his own views on judicial independence, and as it is the opening speech, possibly give direction or suggest an agenda for the project to investigate. The research project being an academic research branch of UCL would no doubt have been keen to secure a prestigious speaker for the launch event, as well as hope to discern some words of guidance from the chosen speaker.

The lecture by Lord Neuberger took place at a policy think-tank, the Institute for Government. The Institute considers its role to be to provide advice, research and direction to help promote effective government. Among its members are policy researchers, students and graduates, but among the hierarchy are senior politicians and civil servants. As well as his own principle number five, we will look at the considerations of principles two, three and four, and what conclusions or effects Lord Neuberger might have considered; for example the concerns over speaking to a political audience on impending law reform. By accepting to

⁹⁰ Lord Mance in the Netherlands, *The Rule of Law - Common Traditions and Common Issues*, 1 October 2013 - <http://supremecourt.uk/docs/speech-131001.pdf>

⁹¹ Lord Sumption speaking in Kuala Lumpur, *The Limits of Law*, 20 November 2013 - <http://supremecourt.uk/docs/speech-131120.pdf>

speaking at the Institute for Government, Lord Neuberger knows that his words will be expected to relate to the functions and objectives of the think-tank; namely promoting effective government. But Lord Neuberger also knows that his audience will not only be made up of policy researchers and students waiting to receive his wisdom, but also of politicians, civil servants and members of Parliament. This of course is a class of people which he could very well seek to address, directly or indirectly, or influence in the same way. But that is, for now, conjecture until we look to substance.

Lord Hope was hosted by the Inner Temple, one of the four Inns of Court. As an inn, the membership is varied, drawing on all stages of a legal career in advocacy. Lord Hope is perhaps here demonstrating the importance Lord Neuberger attaches to extrajudicial comment his first principle. Members include students wishing to be called to the bar, barristers who are qualified and practicing, academics, and also senior judges and politicians who were previously barristers. The Inner Temple is not only representative of the profession of barristers but is better known as a place of education. It can therefore be expected that Lord Hope will be speaking on a legal educational matter, seeking to address the students gathered for a qualifying session. However when we look to the substance of Lord Hope's lecture, it may become more relevant that senior judges and one or two senior politicians may have been present in the audience.

Finally, Lady Hale attended a conference hosted by the Law Society and Potter LJ addressed the Association of Lawyers for Children. As the Law Society is a body representative not only of practicing solicitors but the legal profession as a whole it can be expected that Lady Hale will seek to address the legal profession generally as her audience. The topic can also therefore be expected to be one that will be important to the profession and their work.

Whilst also addressing a representative body of legal professionals, the Association of Lawyers for Children will more likely be made up of family law specialists. As President of the Family Division, we might expect Potter LJ to speak on a matter of common interest or concern to the family law practitioners and judges. Again in inviting senior judges to address gatherings of practitioners, it is likely that the organisers were not only looking for prestigious figures to draw in audience members, but also seeking to solicit support for their opposition to policy reforms.

In many of these, particularly event launches such as at UCL and the lectures to legal professionals, we also need to be aware of the importance of principle six—not seeking publicity for publicity sake and using high office as a springboard for causes.

Having looked at the speaker and form of these extrajudicial speeches we can see that they come from senior judges with a slightly varied record, and are going to take place at markedly different locations. The speaker at a lecture is easily identifiable. But it is not so simple to identify the capacity in which they are speaking. Is the judge speaking as a judge, that is a member of the judiciary, the third branch of government? Or are they speaking personally on a matter which is important to them. Or is it both? To discern this we need to look to the substance of the speeches.

Substance

Judicial speech making has been a common method for extrajudicial comment throughout history. The judiciary have been giving speeches since the dawn of the Inns of Court—the

earliest known recording being by Fyneux CJ at Gray's Inn 1449.⁹² Even in the fifteenth century, the topic of judicial speeches were the legal matters of the day. In 1449 Fyneux CJ discussed the niceties of assumpsit for nonfeasance, and many judicial speeches today focus on recent judgments and legal developments. To speak on a purely legal topic for academic and educational value usually avoids constitutional difficulty or a compromising of judicial independence. Significantly, in the first of his seven principles for judges to consider before speaking extrajudicially, Lord Neuberger acknowledges the great importance of speeches made for academic and educative purposes. He makes specific reference to those speeches drawing on a judge's experience and knowledge. However the purpose of extrajudicial comment has evolved significantly, so that comments are no longer solely educative.

It is instructive to contrast the speech of Lord Hope on vicarious liability to the thoughts and opinions on legal aid cuts by Lady Hale, or even Lord Neuberger's own speech on striking a balance between law and policy as a judge. Lord Hope, speaking on vicarious liability, adopts the historical approach typical of the Inns of Court as places of education. Opining on the future and development of a specific area of law for the benefit of students and the legal profession was very much the substance of the speech. Occasionally such speeches were also a subtle signal to the government of the day to encourage law reform by statute. These speeches served not only as education and development of the common law, but also as a contribution to the programme of Parliament and the executive. So even in a speech where the content appears to be for educational value, there may be subtle suggestions calling for law reform to be placed on the Parliamentary timetable. But the speeches of Lady Hale and Lord Neuberger appear to have adopted a wholly distinct

⁹² Sir Henry Brooke (former Lord Justice of Appeal and Vice – President of the Court of Appeal (Civil Division) *Judicial Independence – Its History in England and Wales*, available at <http://www.judcom.nsw.gov.au/publications/education-monographs-1/monograph1/fbbrook.htm>

approach, attempting to solely contribute and present views to the government. To understand the spectrum of substance of extrajudicial comment these three speeches are considered in turn.

The title of Lord Hope's speech was 'Tailoring the law on vicarious liability' and was given at the Inner Temple. Prima facie, it seems that the substance of the speech is legal in the historical educational sense—of the kind valued by the first of Lord Neuberger's principles. In introducing the topic, Lord Hope cites a judgment delivered the previous year, *Various Claimants v Catholic Child Welfare Society*⁹³ and poses a legal question for the audience:

'Whether the institute could be held vicariously liable for the abuse that was committed in the school by its members while employed as teachers there as well as the bodies that were responsible for the school's management.'⁹⁴

In setting out the case law and resources to be used to answer that question from the view of a student of the law, Lord Hope refers to and elucidates upon court judgments⁹⁵ and draws upon his own wealth of knowledge. So far, there is no hint of the speech being political in nature. In answering the question posed Lord Hope stated that the approach adopted by the courts was to 'tailor' a solution from the commonly accepted legal principle that there were only three relationships that would satisfy the requirement for liability: master and servant, principal and agent and employer and independent contractor.⁹⁶ Exercising common law powers of judicial creation, the courts answered the question posed and succeeded in

⁹³ [2012] UKSC 56, [2012] 3 WLR 1319.

⁹⁴ Lord Hope (n74) page 2

⁹⁵ Ibid, page 13,

⁹⁶ Ibid Page 15

tailoring an answer. But Lord Hope concludes that such activity by the courts will doubtless require ‘refinement’, but omitted whether that would be the duty of the courts, or Parliament, or both. Lord Hope also included this:

Lord Pearson said that what Lord Denning had done amounted to a departure from the agency principle *qui facit per alium facit per se*. It amounted to the introduction of a new basis for liability, which ought to be left to Parliament. It is with those words ringing in one’s ears, as it were, that one turns to the Supreme Court’s unanimous judgment.⁹⁷

Some commentators argue that the case law and incremental expansion of vicarious liability in this way is in need of a rethinking and reform by new statute.⁹⁸ In this light, it can be considered that Lord Hope has made a subtle suggestion that this is an issue which ought to be considered on the Parliamentary programme—a position echoed by the Law Commission.⁹⁹ Therefore despite the value accorded to the speech by the first of Lord Neuberger’s principles, this shift to hint for Parliamentary reform may require Lord Hope to have considered some of the other of Lord Neuberger’s principles.

In considering the terms for classification of extrajudicial comment, attention will need to be drawn to the fact that a label such as ‘educational’ in substance, will not necessarily be absolute. An educational speech can still contain elements that are related to government policy. The extent to which these elements appear will vary from speech to speech, thereby suggesting that a spectrum of speeches exists, rather than absolute labels. Some speeches will

⁹⁷ Ibid page 16

⁹⁸ Phillip Morgan, *Recasting vicarious liability*, (2012) CLJ 71(3) 615 at 616

⁹⁹ Law Reform Commission, Ireland, *Civil Liability of Good Samaritans and Volunteers*, LRC 93 -2009

be more educative than others, and some will be more focussed on government policy than others. This will become more important as our study of the sample progresses. For now we need only note that in terms of this spectrum, the speech by Lord Hope is educative, with subtle hints for law reform. It is clear that Lord Hope is opining from a personal view point on the need for law reform. The remarks that come from his own experiences and encounters, and the conclusions drawn do not suggest that Lord Hope is speaking on behalf of the judiciary as an institution, which is seeking change to the law on vicarious liability. Further examples of educative speeches, such as Lord Judge's 'Summary justice in and out of court'¹⁰⁰ follow a similar pattern. But instead of an analysis of developing case law and legal theory,¹⁰¹ they set out the development of legal procedure and practice. In this particular speech Lord Judge spoke of the history and development of summary justice according to his own experience as a young practitioner and the situation now.¹⁰²

Some educative speeches are neither on legal procedures, or legal developments, but concern the role and office of judges. In these speeches, judges give an account of what being a judge is like, the responsibilities and duties attached, and sometimes an account of their own experiences in becoming a judge.¹⁰³ These speeches still fall into Lord Neuberger's first principle, as they draw on the judges own knowledge and experience.

¹⁰⁰ Lord Judge, *Summary Justice In And Out Of Court*. The Police Foundation's John Harris Memorial Lecture, Drapers Hall, London, 7 July 2011

¹⁰¹ Further educative speeches on the development of legal theory and case law include: Lord Clarke, *What shall we do about fraudulent claims?*, 8 November 2013; Lord Sumption, *Reflections on the Law of Illegality*, 23 April 2012; Lord Hope, *Corroboration and Distress*, 12 June 2009

¹⁰² Further educative speeches on legal procedure include: Lord Neuberger, *Lord Erskine and Trial by Jury*, 17 October 2012; Lord Hope, *In law, is procedure really that important?* 17 Mar 2010; Lord Hope, *Taking the case to London - maybe it's not over after all*, 12 Mar 2010

¹⁰³ For more examples see: Lord Clarke, *The Supreme Court: One Year On*, 11 Nov 2010; Lord Kerr, *Dissenting judgments - self indulgence or self sacrifice?* 8 October 2012; Lady Hale, *Judgment writing in The Supreme Court*, 30 Sep 2010

The second speech is by Lord Judge speaking at the Commonwealth Conference on Judicial Independence and Responsibilities. We expect this speech to be educative; drawing on the experiences of Lord Judge to discuss the doctrines of judicial independence and his views on judicial responsibilities. We see this in the start of the speech.¹⁰⁴ Lord Judge gives a brief overview of the importance of judicial independence and the experiences of the commonwealth delegates, before drawing on an anecdotal experience he had at a meeting of European judges. This all serves to demonstrate judicial independence and its perception as seen and experienced by Lord Judge. The educative feature continues with a factual account of the ‘Fortisgate’ incident in Belgium.¹⁰⁵ Here, the Prime Minister had publicly admitted that a Minister’s officials had repeatedly contacted the husband of one of the appeal judges in the course of a high-profile and controversial case. The case concerned financial irregularity. In Lord Judge’s own analysis of the Fortisgate incident it is still educative in substance—Lord Judge opines as to the point at which vigilance and caution to prevent interference with judges should begin. The content then turns towards the history of the development of the common law, and the responsibilities that judges have and must observe in ensuring that their decisions are made free from influence or interference. Though there are repeated references to judges having a duty to resist any attempt at interference by the press, public or the executive, the views of Lord Judge are still educative.

However, the factual discussion then touches on a specific example in the UK; the use of control orders for terrorism suspects.¹⁰⁶ It could be argued here that Lord Judge leaves the educative and moves into a slightly more politically sensitive discussion. However, on reading the relevant passages it is significant that the Home Secretary concerned is not named; the

¹⁰⁴ Lord Judge, (n71) page 1

¹⁰⁵ Ibid, page 2

¹⁰⁶ Ibid, page 4

strong words used at the time in criticism of the Law Lords refusal to enforce control orders are avoided;¹⁰⁷ and Lord Judge cannot be said to have gone too far into matters of public policy having only given a historical account of what happened. Lord Judge remains in indirect retrospective compliance with the informal guidance from Lord Neuberger (if ever he read it). This point serves to note that Lord Neuberger did not create his suggested principles anew, but drew them from established and accepted practices and conventions within the judiciary and sought to formalise and elucidate them.

For a greater example of pushing along the spectrum from educational in substance to political, Lord Neuberger presents a good example, speaking in 18 June 2013.¹⁰⁸ The method of commenting, again, is clearly identifiable; Lord Neuberger gave a speech. But more telling was the location—not an inn of court or law school, but the Institute for Government. So sometimes, the form of a speech can also suggest what might be the substance; here, a political point. The speech was titled ‘Judges and policy: a delicate balance’. It is generally assumed that policy is a matter for Parliament and government and not for judges, so by choosing this as a title we can expect a political point in the course of the speech. Lord Neuberger asserts:

This does not mean that the Judiciary should have no policy role. ...Nor does our history support the notion that the courts should be a policy-free zone. The common law is the continuous product of judicial policy-making through decided cases since

¹⁰⁷ *Terror control orders breach human rights, law lords rule*, Guardian 10 June 2009, available at <http://www.theguardian.com/politics/2009/jun/10/control-orders-breach-terror-suspects-rights>

¹⁰⁸ Neuberger (n73)

1066, but it is policy-making subject to the Legislature.... And the Judiciary has a limited right, indeed an obligation, to speak out on matters concerning the rule of law.¹⁰⁹

In the course of a speech we expect to be about judges and policy, Lord Neuberger states, ‘We should take great care in any approach to reduce access to judicial review. It is a small price to pay for a democratic and just society.’¹¹⁰ This is a warning, however subtle, to a government in the process of entertaining restrictions and reform of the judicial review process. Lord Neuberger falls short of stating his outright opinion on reform; caution stemming from the principle of judicial independence perhaps. But there is a clear message to the government and its officers present in the audience at the Institute that ‘great care’ be taken with any attempt to reduce access to judicial review. Whilst repeatedly highlighting the importance of the judiciary refraining from commenting upon government policy,¹¹¹ Lord Neuberger sets out his thoughts as to what constitutes the duty of a ‘civilised government’.

¹¹² Indeed, Lord Neuberger goes further to explicitly set out two ‘specific warnings’ aimed directly for government attention.¹¹³ Firstly, Neuberger warns against reductions to the legal aid scheme which would drive out ‘the best lawyers’, and suggests that such changes would result in more appeals, and miscarriages of justice, requiring more money that would be saved by the proposed cuts. Secondly, Neuberger comments on the implications these cuts will have on delaying the business of the courts. Prima facie, Lord Neuberger has overstepped the separation of powers and has allowed himself to criticise government policy. On closer inspection however, we see that Neuberger has followed each criticism with a valid link to

¹⁰⁹ Ibid page 3 para 7

¹¹⁰ Ibid page 4 paragraph 9

¹¹¹ Ibid page 4 paragraph 11

¹¹² Ibid page 9 paragraph 22

¹¹³ Ibid page 9 paragraph 25

how the proposals would adversely affect the administration of justice. We have already seen how important this exception to the rule prohibiting judges from commenting on policy is.

In essence, Lord Neuberger warns against overly restricting access to judicial review, since ‘the three branches of government share a common aim’ in preserving the good of the nation. This attempt to caution restrictions to judicial review, and highlighting of the damage to the rule of law that will result, means that this is no longer a slight suggestion for reform. Though it is arguably to educate an informed debate about legal development, here the cost of legal aid, there are explicit attempts to influence the Parliamentary programme. In terms of classification, this pushes Lord Neuberger’s speech further towards being political in substance. This substance also assists us with finding out who is speaking; Lord Neuberger personally, or Lord Neuberger as a representative of the judiciary (and the UKSC in particular). The attempts to limit access to judicial review were heavily criticised by Lord Neuberger. Not because judicial review interests him, though it may well, but because such cuts are of concern to the administration of justice by the judiciary, and the issue is therefore one which requires a unified objection from the judiciary. Though not explicitly stated, Lord Neuberger’s views, as expressed, are likely shared. To voice concerns in this way does suggest that Lord Neuberger was speaking on behalf of the judiciary.

Similarly Lord Philips in his speech at the UCL appears to adopt an educative approach, setting out a summary of the judicial appointments process, its history, changes, and reforms, and the creation of the UKSC over the first 12 pages of the speech. Lord Phillips also focuses on a proposed scheme of administration and funding for the Supreme Court by Lord Falconer then Lord Chancellor. But then Lord Philips’ own personality comes through where he states; ‘Now let us see what the Act in its final form had to say about our funding’ and

sets out the provision of the Act.¹¹⁴ He concluded ‘I cannot recognise in those provisions the scheme that Lord Falconer had described to the House of Lords.’ Lord Philips has avoided any of the ‘trespasses’ into policy debate envisaged in the caution of Neuberger’s fourth principle on the separation of powers. Instead he has set out the facts of what were proposed, what actually happened, and the differences (i.e. shortcomings). Lord Philips then sets out the struggle of negotiations that he has been involved with to secure funding for the UKSC and concludes with damning remarks:

‘My conclusion is that our present funding arrangements do not satisfactorily guarantee our institutional independence. We are, in reality, dependant each year upon what we can persuade the Ministry of Justice of England and Wales to give us by way of ‘contribution’. This is not a satisfactory situation for the Supreme Court of the United Kingdom. It is already leading to a tendency on the part of the Ministry of Justice to try to gain the Supreme Court as an outlying part of its empire.’¹¹⁵

Chapter one noted that private judicial-political meetings take place, but that public extrajudicial comments were important because they could be a means of last resort i.e. when private negotiations and communications are unsuccessful, a judge can make their concerns known publicly to draw attention to the issues faced. On this point, a point of friction had arisen between the Ministry of Justice and Lord Phillips over differences in how the Chief Executive of the Supreme Court should be viewed, prior to the making of this speech. The office of the Chief Executive of the Supreme Court is responsible for many important aspects of the running of the Supreme Court. These include securing the funding for the

¹¹⁴ Phillips (n72) page 13

¹¹⁵ Ibid pages 13 to 15

court, internal management of staff and functions, preparing reports on the courts functions and administration, establishing good relations with judges and politicians, and setting out the strategy and development of the court.¹¹⁶ During private discussions it transpired that the MoJ viewed the Chief Executive as a bureaucratic office, essentially a civil servant answerable to the ministry. But the UKSC, felt that the role was constitutionally important, in ensuring the independence of the court from government interference.¹¹⁷ It is thought that these negotiations were deadlocked, and so Lord Phillips decided to voice his concerns publicly. Importantly Lord Phillips set out how the administrative team of the UKSC were essentially civil servants, answerable to Ministers and not the President of the Court—a matter which he perceived as detrimental to the institutional independence of the Court.¹¹⁸ So even though Lord Phillips does not, in substance cross the line into policy discussion, and remains focussed on matters pertaining to the administration of justice, this public speech is a clear public communication not only to the government, but also to the wider judiciary, legal professions, and media, that there are important issues facing the independence of the judiciary, and they need to be dealt with in the way envisaged by Lord Phillips. This is very important for our purposes as it not only criticises the government for its unwillingness to constructively discuss this matter in private communications, but also shows how Lord Phillips almost forces the government to listen, by ‘going public’.

Pushing even further along the spectrum, Lady Hale gave a speech in June 2011 to the Law Society. As members of a representative body of legal professionals, the audience may again

¹¹⁶ For a detailed discussion of these 5 main duties of the Chief Executive, see G Gee, *Guarding the guardians: the Chief Executive of the UK Supreme Court* [2013] PL 538

¹¹⁷ A detailed discussion of the differing views of the MoJ and SC President, over the Chief Executives responsibilities, and the prevailing argument can also be found at G Gee, *Guarding the guardians: the Chief Executive of the UK Supreme Court*, *ibid*

¹¹⁸ Phillips (n72) page 16

allow for some speculation that the topic may be about the profession or its working conditions. The speech was titled ‘Equal Access to Justice in the Big Society’. Those words alone are indicative that the substance of the speech will be a ‘study’ of the Prime Minister’s sound bite concept of ‘the big society’. Lady Hale poses the question, in an apparently academic and education fashion, what is the legality of restricting access to justice? Lady Hale then sets out, as is typical of academic extrajudicial speeches and articles, the possible statutes, European jurisprudence, and common law cases that would help to answer and initiate debate on the subject.¹¹⁹ But despite complying with these academic conventions, and its seemingly educative theme, The Guardian reported that the position adopted by Lady Hale was ‘likely to be received as a direct challenge to one of the government’s major cost-cutting measures’.¹²⁰ Yet the text of the speech at no point discloses criticism directly from Lady Hale, who instead refers to the Government’s own Equality Impact Assessment observations in order to highlight concerns—concerns she may, or may not share. Lady Hale states:

‘[T]hey say that this is justifiable because they are disproportionate users of the service in these areas. This is an interesting argument about which I had better not say anything more, as it is bound to come before us in one shape or form in future.’

As Lord Neuberger did above, Lady Hale fell short of explicitly stating a view, so as to avoid compromising judicial independence and presumably to prevent an application to remove Lady Hale from any subsequent appeal to the UKSC on legal aid cuts, on the grounds that she had arguably prejudged the issue. Looking back to the spectrum, these are comments made on proposed legislation from the government, with a clear intention that the words of

¹¹⁹ Hale (n75) Pages 4 through 12

¹²⁰ *Supreme court judge warns legal aid cuts will hit poorest*, Guardian 28 June 2011, available at <http://www.theguardian.com/law/2011/jun/28/supreme-court-judge-legal-aid>

warning and caution be received and considered. This is a speech which can be classified not as a hybrid, but as political in substance. Lady Hale is sending a message to the legal profession that they are not alone in their concerns about legal aid cuts; that the judiciary are also concerned. In pointing out the flaws to those cuts, Lady Hale is attempting to address the government directly, not on her own behalf, but on behalf of a concerned judiciary and a profession to which she and many judges once belonged.

Another example of this can be seen in the final sample speech by Potter LJ. As then President of the Family Division, Potter LJ holds the highest office in the family courts and the leadership role responsible for the administration and procedure of the family courts. Like Lady Hale, we can expect a show of support and leadership from Potter LJ for the legal professionals facing government cuts to legal aid. We might even see more leadership from Potter LJ than from Lady Hale, since he is the President of the Family Division, and is here addressing an audience of family lawyers.

Potter LJ makes some very important observations about the role of the judiciary and the reforms of the CRA. Early in the speech¹²¹ Potter LJ sets out, as most judges do before making what might be perceived to be outspoken remarks about the family law reforms proposed by the government of the day, how he believes it is not appropriate for judges to attack government policy.¹²² Like Lady Hale, Potter LJ uses third party reports, here the Laming Report, to point at the shortcomings of the government policy. Further Potter LJ identifies a significant effect of the CRA; Judges are now responsible for the administrative policy of their division and courts including budgets and funding. Organisations charged

¹²¹ Potter LJ (n76) page 2

¹²² See Lady Hale opening in a similar way above, (n75) “It is not the proper role of any judge to attack government policy”

with caring for children in legal proceedings are now subject to government department budgets and targets, which as Potter LJ suggests makes cross purposes and aims more likely and problematic.

Here Potter LJ shows the same restraint as Lady Hale. Lady Hale we saw utilised statistics and reports from other third parties and relayed them to discredit the governments proposed legal cuts, but never actually adopted any of them as her own position. The speech was more of a report of reports and reasons why the government proposals were ill thought out. Potter LJ appears to take a similar approach.

The expansion of extrajudicial speeches into presenting arguments to the government is a result of what has been referred to as a significant need for the senior judiciary to comment on matters which profoundly affect the proper administration of justice. In both their speeches, Lord Neuberger and Lady Hale were sure to state this. Whilst the courts acknowledge that Parliament may limit a court's jurisdiction without comment, the judiciary insist rightly that comment must be made where actions are taken to limit or unhinge the court's ability to fulfil, as Lord Diplock said, its constitutional function of doing justice.¹²³ It is on that basis that Lady Hale sought to argue that ill-considered cuts to legal aid would not only preclude the courts' ability to do justice where there are too many unprepared litigants in person, but also that only the rich and able would be willing and able to use the courts.

Potter LJ also explicitly identifies, unlikely the very subtle hints of Lord Hope above, that he is at times speaking directly to government; even if they will not listen: 'it emphatically is my

¹²³ *Bremer Vulkan Schiffbau v South India Shipping* [1981] AC 909

concern as Head of Family Justice to bring forcibly to the attention of the government the threat to the efficient working of the system in terms of both efficiency and delay'.¹²⁴

Proliferation of extrajudicial comment from speeches into further discussion

In chapter one, it was suggested that extrajudicial speeches should not be considered in isolation, and that speechmaking could be used as a way to trigger further discussion and communication between judges and the political class. This section uses the speeches we have just analysed to examine the way in which extrajudicial comments from speeches might progress in this way.

The speech by Potter LJ was picked up on by his soon successor Sir Nicholas Wall LJ in a speech given a few months later that year, also before the Association of Lawyers for Children.¹²⁵ Wall LJ comments 'nobody listening to this year's ALC Hershman Levy Memorial Lecture, delivered by the President in the summer, could have been left in any doubt that the President was coming off the Bench and speaking his mind.' In the transcript of Wall LJ's speech we see a reference to a letter sent by the then Secretary of State for the Home Department to Potter LJ as President.¹²⁶ Though the letter does not arise out of Potter LJ's speech, it does state that it is in response to comments and findings made by Potter LJ in an extrajudicial capacity as chairman of the Family Justice Council. Though three years prior to Neuberger's fifth principle, the point made there about how judges should consider the impact, effect, and possible development or interpretation of their comments appears to

¹²⁴ Potter LJ (n76) at page 16

¹²⁵ At paragraph 12, of the Speech by Wall LJ, Justice For Children: Welfare Or Farewell?, 21 November 2009 available at - http://www.alc.org.uk/uploads/Keynote_2009.pdf

¹²⁶ The letter referenced between paragraphs 34 and 35 of the speech by Wall LJ, *ibid*, can be seen in full at <http://data.Parliament.uk/DepositedPapers/Files/DEP2009-2832/DEP2009-2832.pdf>

be necessary. There are some better examples of proliferation of comments made by judges extrajudicially into further debate.

From our sample the first speech by Lord Judge to the Commonwealth association was reported in academic circles appearing in academic texts, international reports, and law commission reports.¹²⁷ Addressing a sizeable gathering in Hong Kong on the core constitutional notion of judicial independence, unsurprisingly, failed to capture the imagination of the press. But no doubt Lord Judge felt that the lecture gone well, as publicity for publicity sake is frowned upon. Lord Neuberger addressing the Institute for Government was later cited in academic circle as well; most notably by the Chief Justice of New South Wales.¹²⁸ Significantly the clerks of the Lords, cited Neuberger's speech in an explanatory note for a debate in the chamber on cuts to legal aid funding.¹²⁹ This is a good example of how speeches might be brought to the attention of MPs and peers, for consideration in Parliamentary debate. Whether any of Neuberger's comments were heeded, I cannot say. What is significant then, is that Neuberger's words spread beyond the 'theatre' in which he spoke them, and were communicated to peers. Thus far in my research I have not found any citations of Lord Hope's speech on vicarious liability. Lady Hale however appears to have captured the imagination of the press more so than any other speech in the sample. Reported in two major newspapers (Guardian¹³⁰ and Express¹³¹, and even the local Halesowen

¹²⁷ Documented in S Shetreet and C Forsyth, *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*, (Martinus Nijhoff Publishers, 2012) at page 150

¹²⁸ The reference to Neuberger in the speech of the Chief Justice of New South Wales can be viewed at: [http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/supremecourt/m6700011771004/bathurst_2013.10.11\(2\).pdf](http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/_assets/supremecourt/m6700011771004/bathurst_2013.10.11(2).pdf)

¹²⁹ House of Lords Library Note, 5 July 2013, LLN 2013/019, on page 4 available at <http://www.Parliament.uk/briefing-papers/LLN-2013-019.pdf>

¹³⁰ *Supreme court judge warns legal aid cuts will hit poorest*, Guardian (n120)

¹³¹ *Judge warns over legal aid cuts*, Express, 28 June 2011- <http://www.express.co.uk/news/uk/255576/Judge-warns-over-legal-aid-cuts>

News¹³²), on a well-known law blog (UK Human Rights Blog)¹³³ and the Law Society Gazette for law practitioners.¹³⁴ There is, at least within this small sample, a correlation suggesting that the less educational a speech on our spectrum, and the more political in substance, then the greater the chance for reporting and proliferation into further debate.

However the sample also showed a more subtle proliferation of comments, specifically on the part of Lord Philips. We saw how in his speech on judicial independence to the UCL, he raised concerns that the administrative Chief Executive of the Supreme Court was answerable to the Lord Chancellor and not himself, the President of the Supreme Court. The following day Ken Clarke, then Lord Chancellor, was quick to criticise and rebut Lord Phillips remarks, stating that this was simply a ‘storm in a teapot’ and ‘of course’ the judiciary was independent.¹³⁵ That seemed to be the end of that. Yet in his retirement Lord Phillips used his position as a peer to introduce an amendment addressing his concerns raised in February 2011. This was by amendment to the Crime and Courts Bill, now as s.29(1) Crime and Courts Act 2013. S.29(1) explicitly amended the CRA to make the Chief Executive solely appointed by and accountable to the President of the Court. On the one hand, this is perhaps a subtle means of communication: Lord Neuberger as his successor as President of the UKSC was said to have liaised with Lord Phillips to encourage him to move an amendment. Such a move could be interpreted as an example of indirect interaction with the legislature by the UKSC via a former retired Justice, during a much larger debate and discussion over

¹³² *Judge warns over legal aid cuts*, Halesowen news, 28 June 2011-

http://www.halesowennews.co.uk/uk_national_news/9110230.Judge_warns_over_legal_aid_cuts/

¹³³ *Lady Hale on access to justice, legal aid and staying at The Ritz*, UK Human Rights Blog, 28 June 2011

<http://ukhumanrightsblog.com/2011/06/28/lady-hale-on-access-to-justice-legal-aid-and-staying-at-the-ritz/>

¹³⁴ *We must make our voices heard in the campaign to maintain equal access to justice*, Law Society Gazette, 30 June 2011, <http://www.lawgazette.co.uk/analysis/we-must-make-our-voices-heard-in-the-campaign-to-maintain-equal-access-to-justice/61180.article>

¹³⁵ *Kenneth Clarke rejects claim of threat to supreme court independence*, Guardian 9 February 2011

<http://www.theguardian.com/politics/2011/feb/09/kenneth-clarke-rejects-claim-supreme-court-independence>

whether the Chief Executive was bureaucratic and answerable to the MoJ or constitutionally important and answerable to the Supreme Court. On the other hand, the reliance on a retired justice to use his position as a peer to raise an issue of concern to the UKSC might underline the basic starting point of my project: i.e. there might be insufficient direct channels of communication, or those that exist are ineffective.

The importance of this sometimes strategic proliferation of extrajudicial comments from speeches into the press, academic journals or Parliamentary debate, cannot be underestimated. Neuberger set out the caution to be observed over making comments which might attract too much attention in the fifth (consider the impact on the audience and beyond) and sixth (avoid publicity for publicity sake) principles. It is clear from looking at our sample of six, that sometimes a press storm may well be triggered by well-meant comments defending the administration of justice, but may either ultimately be less successful as a subtle strategy like Lord Philips, or may draw unwanted criticism of the judiciary as speaking out of turn.

Conclusion

In making an extrajudicial comment there are many more things to consider than simply the, admittedly still very important, concepts of the independence and integrity of the judiciary. Judges often engage in scholarly pursuits in an extrajudicial capacity, seeking to share and discuss knowledge about the law, legal procedure and judicial system. However we have also found a deeper thinking to the three stages of classification. As speakers, judges are becoming more and more aware of each other and their own track records of speaking out extrajudicially—such awareness and information formed the background for Lord

Neuberger's speech to the Holdsworth Club. This awareness is allowing judges not only to support each other and bring together the judiciary as an institution but also allow discussion and debate should judges disagree.

For form, it is clear that speeches as means of extrajudicial comment have expanded since the Kilmuir Rules, and markedly since the CRA 2005. Speeches are now more commonplace, and senior judges are being invited to speak before a more diverse range of audiences, at different locations. But even here there is consideration to be had. Specific venues and events allow judges to interact with specific audiences, either directly before them, or indirectly depending on where or who their words are reported to. Careful choices have been made in the speeches we have studied, to ensure that where a judge wishes to express concern, for example on proposed government cuts to access to justice, then to do so with the best possible effect is to speak before a gathering of angry professionals, or encourage Parliamentary committees to publish the concerns based on evidence to properly inform the government programme.

The substance of extrajudicial comment shows the biggest changes over the years. The evolution into new purposes from the historic educative role of judges in an extrajudicial capacity has opened up a new speechmaking as a means of indirect communication with politicians. Whether by a subtle suggestion calling for law reform, or a critical account of government policy, speeches are being increasingly recognised as a tool for communication. Where judges make speeches on pertinent or seemingly controversial issues, there is good chance that the speech will trigger further debate. This is a theme that we further develop in chapter three. Though admittedly somewhat speculative, there is some evidence above that speeches are becoming a tool of last resort, where private communications fail. Pre-2005, the

means of last resort would have been for the Lord Chief Justice or one of the Law Lords to make a speech in the House of Lords.¹³⁶ Now that this option has gone, it is arguable that speechmaking by judges has, in part, taken its place. Whether meriting a quick response from government ministers, or an invitation to appear before a Parliamentary committee; extrajudicial speeches can play a crucial part in the overall scheme of judicial-political communications.

Having categorised specific examples of extrajudicial speeches in the three stage test, it is now possible to move on to assess the adequacy of those methods for extrajudicial comment, since the CRA 2005 in chapter four. Before this, we also analyse and classify examples of oral evidence before Parliamentary committees in chapter three.

¹³⁶ A key example of this, was when Lord Woolf spoke on the negotiation between himself and Lord Falconer in drawing up the concordat for the Constitutional Reform Bill, HL Deb 08 March 2004 vol 658 cc979-1006

CHAPTER THREE EVIDENCE TO PARLIAMENTARY COMMITTEES:

This chapter examines judicial evidence in oral hearings before Parliamentary Committees. It does so in two parts. The information studied in Part A, setting out the practicalities of oral evidence, informs the analysis in Part B, which explores specific examples of oral evidence as a means of judicial-political communication. Part A focuses on the process and reasons for arranging committee appearances, changing judicial attitudes to such appearances, and the current guidance to judges on such appearances. Part B then embarks upon a classification and analysis of a sample of oral evidence sessions. As with extrajudicial speeches in the previous chapter, this is important in order to investigate the effects the CRA has had on the practice in both the manner of judges appearing before Parliamentary committees, and the way judges and politicians approach an appearance. For example, we may see particular senior judges appear more frequently, or judges becoming more outspoken, or that judges are given flexibility to bring their own concerns to the committee's attention. We may also see differences as to how senior judges, and committee members approach the practice; perhaps with more or less reluctance to appear on the part of judges, or more or less reluctance to be too outspoken.

Extrajudicial speeches are public comments, sometimes made indirectly to politicians. Oral evidence is a direct means of communication between judges with at least some MPs and peers. It is therefore arguably of greater value and importance. Together, the two arguably become even more important, since extrajudicial comments made in a speech, can subsequently inform a Parliamentary committee's inquiry, leading to further discussion. With some sixty five speeches from Justices of the Supreme Court alone, since 2009, there are more speeches made by judges than committee appearances (which according to one study

average around one a month).¹³⁷ But this chapter will show that, with formal guidance and preparatory private communication, oral evidence is a more targeted form of careful judicial-political communicating.

The constitutional changes introduced by the CRA have also been accompanied by an increasing demand by Parliamentary select committees to have judges giving evidence on a wide number of issues. Historically, the Judicial Executive Board states that judges were ‘virtually never’ called to appear before Parliamentary committees.¹³⁸ However given the dual personalities of the most senior judges sitting as both judge and peer of the House of Lords prior to the CRA 2005, and the presence of judicial figures in the Cabinet and the Lords, that does not mean that there were no interactions between judges and Parliament.¹³⁹ But post 2005, judicial appearances before committees have increased from ‘virtually never’. According to Beatson LJ, senior judges were called to give oral evidence on twenty occasions in the eighteen months from April 2006 (when the Lord Chief Justice became Head of the Judiciary) to December 2007.¹⁴⁰ Furthermore, a total of thirty-eight judges from all levels of the judiciary have been called to give oral evidence to a variety of Parliamentary committees, between 2006 and August 2012, with many of those appearances before the Commons Justice Committee and Lords Constitution Committee. The LCJ and Heads of Divisions appeared most frequently.¹⁴¹ This suggests that the CRA 2005 has so restricted judicial access

¹³⁷ G Gee, R Hazell, K Maleson, P O’Brien, *The Politics of Judicial Independence in the UK’s Changing Constitution*, (Cambridge: CUP, forthcoming) Chapter 6

¹³⁸ JEB Guidance to Judges appearing before select Committees at page 1 para 1. Available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/select_committee_guidance.pdf

¹³⁹ For an important examples of Judges speaking on the floor of the House of Lords, see Lord Woolf as Lord Chief Justice, stating the importance of how he sees it as his responsibility “because of the office that I hold, to communicate to your Lordships directly the views of the judiciary”, HL Deb 08 March 2004 vol 658 cc979-1006 at 1003

¹⁴⁰ Beatson LJ, *Judicial independence and accountability: pressures and Opportunities*, (n26)

¹⁴¹ Le Sueur *Parliamentary Accountability, and the judicial System* in Leyland and Bamforth, *Accountability in the contemporary constitution*, (OUP 2013) 208

to government and Parliament, that the one remaining constitutionally acceptable method of direct communication via committee evidence is bound to become more prevalent. It will be interesting to see if we can discover whether the judges or the committees sought these annual appearances; if the senior judges made a greater push for them, then it suggests that this desire for regular interactions with Parliament is seen as valuable and useful for the judges. On the other hand, if the committee was the driving force, we may discover that the meetings are viewed as Parliament holding judges to account regularly, as a part of the wider Parliamentary discussion for greater accountability of judges. Perhaps most obviously, here accountability relates to the increasing administrative, management, and leadership roles exercised by senior judges. The importance of oral evidence cannot be underestimated and is demonstrated, unlike with extrajudicial speeches, by specific, formalised and targeted guidance by the Judicial Executive Board's, *Guidance to Judges appearing before Select Committees*. That formal guidance was deemed necessary could be taken to suggest that oral evidence is becoming more prevalent. As will become clear, the judiciary is concerned that appearances have the potential to undermine judicial independence, particularly since the publicly broadcasted sessions show judges and MPs and peers meeting to discuss matters in an intimate, yet formal, setting.

Part A: The Process of Arranging an Appearance

Whilst some appearances are now a matter of routine (e.g. the now annual appearance of the Lord Chief Justice, President of the Supreme Court and Deputy President of the Supreme Court), the process for arranging or preparing for an appearance before a Parliamentary

committee generally follows the four main stages set out in the JEB Guidance.¹⁴² First, the Parliamentary committee's clerks make a request to the particular judge to attend a committee hearing. Today, such requests are made via the Private Office of the Lord Chief Justice. Second, the judge is required to consider various principles as set out in the JEB Guidance which provide advice on when it is appropriate to accept an invitation to appear.¹⁴³ (We will look at this guidance shortly). Third, the Parliamentary clerks and the judge negotiate the line of questioning to be taken in the committee hearing, ensuring questions focus on the committee's subject of inquiry and do not breach any constitutional principles or Parliamentary rules. (These various rules are discussed below). Finally, the judge conducts the necessary research to answer the agreed questions in preparation for the hearing.

At stage one, the process provides for a centralised system¹⁴⁴ anticipating that, as a result of discussions between the senior judiciary and Parliament,¹⁴⁵ requests for judges to provide oral or written evidence to a committee will be first sent to the Private Office of the LCJ. This is followed by a comment that this is to aid centralised record keeping and in no way 'intended to compromise the independence of individual judges'. The measure recalls the strict regime under Lord Kilmuir, that the head of the judiciary should be contacted in the first instance. But given the arguments for setting aside those rules in order to advance individual judicial independence and the need for record keeping to charter changes in practice since the CRA, this seems reasonable here. Only if it transpired that the office of

¹⁴² JEB Guidance (n138)

¹⁴³ Ibid, at paragraph 23

¹⁴⁴ Ibid, at para 6

¹⁴⁵ Perhaps of the kind suggested by Mr Graham Gee: "The previous LCJ, Lord Judge, and the current Clerk of the House of Commons, Sir Robert Rogers... have developed more frequent informal contacts. To aid a better mutual understanding, the Clerk of the House has begun holding regular informal meetings with the LCJ and President of the UK Supreme Court, ... The new guidance from the Judicial Executive Board in 2012 on judicial appearances before select committees is in part a product of these contacts." G Gee, *The Lord Chief Justice and Section 5 of the Constitutional Reform Act*, (n52)

the LCJ sought to prevent the appearance of a judge before a committee without that judge's consent, or that the LCJ was pressuring individual judges to relay a uniform opinion shared by all judges but dictated by the LCJ, then there would be serious concerns for this procedure. Indeed it is important to note that there are no public reports or records in recent years of the Lord Chief Justice having ever prohibited the attendance of a judge before a select committee.¹⁴⁶ Instead the figures collated by the office of the LCJ as to the number of committee appearances, and by which individual judges, has allowed for reporting of the numbers of sessions of oral evidence in the LCJ's periodic reports.¹⁴⁷ This is important for addressing the concern held by some, that judges and politicians should not interact too frequently in order to maintain judicial independence in both fact and appearance. However, this concern can be overcome by the first consideration made by the LCJs office and the judge concerned, as to whether or not written evidence would be more appropriate than an appearance.¹⁴⁸

By choosing to submit written evidence, judicial concerns over inappropriate questions from the committee are addressed. Furthermore, the associated risk of unwittingly compromising answers is also avoided. In publishing a 'call for written evidence' a committee will set out the subject and scope of their current inquiry and list a series of pertinent sub-questions that they will investigate. Responses are then invited which may deal with some, or all, of the questions posited.¹⁴⁹ It should also be noted here that as well as committees approaching

¹⁴⁶ Despite my enquiries and research, particularly into the interviews and empirical data of other research projects, I have been unable to find any accounts of this happening. It is possible, though I suggest unlikely, that any refusal by the LCJ would be private and not the subject of any media coverage or reporting

¹⁴⁷ See the report of Lord Judge 2010 to 2012, which set out the information on judicial appearances before committees at page 4 *Relationship with Parliament*: available at <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/lcjreport10-12.pdf>

¹⁴⁸ See paragraph 24 of the JEB Guidance (n138)

¹⁴⁹ For a clear example of a call for evidence, see the Lords Select Committee On The Constitution: The Judicial Appointments Process: Call For Evidence <http://www.Parliament.uk/documents/lords-committees/constitution/JAP/FinalCFE130511.pdf>

judges, judges may ‘volunteer’ to assist by submitting written evidence during these calls for evidence. Judges may also request an appearance for oral evidence before a committee.¹⁵⁰ From 2006 to 2012, fifteen judges submitted written evidence to five different Parliamentary inquiries, while thirty eight judges gave oral evidence to twelve different Parliamentary inquiries.¹⁵¹ The difference between the numbers of judges giving written and oral evidence suggests a preference of judges for direct personal interaction with politicians in order to communicate. Though written evidence may trigger an invitation for an appearance (in order to question the written views further),¹⁵² the absence of a two-way dialogue in the form of written evidence is one of the important reasons this chapter focuses on oral evidence and not written evidence, before Parliamentary committees.

At the second stage described above, the JEB Guidance provides a list of matters for individual judges to consider before accepting a committee’s invitation to appear. Of particular importance is the risk of lines of questioning into areas that lie outside an individual judge’s expertise.¹⁵³ Even in these preliminary stages of negotiating an appearance, it is clear how much work needs to be done by the prospective judge. But it also points to the importance of good communication between judges, politicians, and Parliamentary clerks. The third stage involves the committee clerks, committee members and the judge and/or the Judicial Office negotiating what questions are appropriate to be asked, or which questions the judge would or would not be willing to answer. Therefore in order to communicate by

¹⁵⁰ For example Lord Woolf as LCJ volunteered to appear before the Parliamentary enquiry into the use of public inquiries - House of Commons Public Administration Select Committee, Government by Inquiry, First Report (2004–05)

¹⁵¹ A record of written and oral evidence from 2006 to 2012 is helpfully set out in A Le Sueur *Parliamentary Accountability, and the judicial System* in Leyland and Bamforth, *Accountability in the contemporary constitution*, (OUP 2013) Appendix 3

¹⁵² For example, see Lord Phillips written evidence and subsequent appearance to be questioned over it regarding the creation of the Ministry of Justice before the Commons Justice Committee in 2007: available at <http://www.publications.Parliament.uk/pa/cm200607/cmselect/cmconst/466/46602.htm#evidence>

¹⁵³ JEB Guidance (n138) at paragraph 23

appearing before a Parliamentary committee in public, private communications are essential to ensure the smooth running of the session.

The final stage requires the judge to prepare to answer questions to assist the committee in its inquiry. Examples of committee inquiries include the diversity of the judiciary, the judicial appointments process, family court procedure, or the use of comparative law. In answer to questions on these topics judges will have needed to research a variety of topics. Some of these include judges having to: sometimes collate empirical data on the composition and personal qualities of the judiciary; report on the details of the judicial appointments process and experiences of it; and, reading and summarising case law and procedural guidance. The preparation required by the prospective judge will need to be sufficient to deal with the committee questions and can therefore vary from inquiry to inquiry. As we will see, this leads to concerns among the senior judges about the amount of court time that is lost when judges accept, prepare for and ultimately appear before a Parliamentary committee.

Should a judge refuse to attend the guidance states that ‘It is extremely unusual and very unlikely to be the case that a Parliamentary committee will order a judge to attend’.¹⁵⁴ Remarkably, this falls short of stating that committees have no power to order a judge to attend. Whilst in theory a committee could order a judge to attend, as with any other witness, it would be constitutionally improper to do so.¹⁵⁵ The Scottish Parliament and Northern Irish Assemblies are explicitly precluded by statute from ordering judges to give evidence.¹⁵⁶ A

¹⁵⁴ Ibid, at paragraph 26

¹⁵⁵ R Kelly, *Select Committees: Powers and Functions* in A Horne, G Drewry and D Oliver, *Parliament and the Law* (Oxford: Hart Publishing 2013) 161, 186-187

¹⁵⁶ Scotland Act 1998 Section 23(7) and Northern Ireland Act 1998 section 44(5)

scenario which saw the provision invoked by the Lord President of Scotland, which initiated negotiations and an eventual closed door, private meeting with MSPs.¹⁵⁷

As stated earlier, the need for intense preparation is essential in order to ensure judges are comfortable and satisfied that the line of questioning will not put them in compromising positions or solicit answers that they simply cannot give. To that end, Parliamentary clerks of the committees will draft questions and agree the content of those questions with the judge concerned, and the office of the LCJ. This therefore gives rise to another judicial concern that committee appearances demand much time and preparation despite limited resources. A judge may be required to use the day before a hearing to prepare for the evidence session, for example with research and collation of data or case law, and then half a day actually giving the evidence before the committee. That is at least two days of the judges time occupied by the committee, where he or she would otherwise have been dealing with and disposing of cases. This has very real implications for the judiciary as a whole (especially senior judges with additional administrative and leadership responsibilities post 2005) in managing their workload.¹⁵⁸

However this process of liaison and agreement has proved to be welcome by both Parliament—willing to negotiate the line of questioning—and the JEB and LCJ—willing to allow judges to appear.

¹⁵⁷ *Scotland's top judge offers tiny concession as calls grow for judicial transparency*, Scotland Herald, 2 February 2014 - <http://www.heraldsotland.com/news/home-news/scotlands-top-judge-offers-tiny-concession-as-calls-grow-for-judicial-transparency.23323523>

¹⁵⁸ These concerns were aired by Lord Phillips as early as 2007; Lord Phillips, *Judicial independence*, Commonwealth law conference, Nairobi, 12 September 2007 (available at http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lcj_kenya_clc_120907.pdf) page 14;

Reasons Why Committees Seek Evidence from Judicial Witnesses

There are a number of reasons that help to explain why committees might invite judges to appear before them. One relates to a change in Parliamentary culture. In recent years committees have been reformed to have elected chairs. The effects of this perhaps include an increased sense of independence and impartiality, increased resources, increased media coverage and reporting, and an increased sense of duty in scrutiny and accountability.¹⁵⁹ This might suggest a shift from the power of Parliament in the chamber to the committee rooms, with committees able to question witnesses from all walks of life while questions in the chamber must typically be addressed to ministers. Committees also prepare reports, consultations, and responses to government proposals.

To aid in this, the appearance of a judge can be valuable as has been acknowledged by Parliament and judges alike. Judges offer an insight into their extensive knowledge and experience of matters which they engage with in court.¹⁶⁰ As well as the educative role of judges giving evidence, so too committees may scrutinise the new leadership role of the LCJ or other senior judges in administration of the judiciary. Furthermore, committees may try

¹⁵⁹ Many of these changes resulted from the 'Wright reforms'. For further discussion of the work of the Wright Committee, the process of reform, and a detailed account of the changes, see: M Russell, '*Never Allow A Crisis Go To Waste: The Wright Committee Reforms to Strengthen the House of Commons*', Parliamentary Affairs (2011) 64, 612–633; D Howarth, *The House of Commons Backbench Business Committee*, (2011) PL 490. The recommendations were made by, and named after the chairman of, the Select Committee on the Reform of the House of Commons chaired by Tony Wright MP. For the reports of the committees work see: House of Commons Reform Committee, *Rebuilding the House*, 1st Report (2008-2009 HC117); House of Commons Reform Committee, *Rebuilding the House: Implementation* 1st report (2009-2010 HC 372); The House of Commons Political and Constitutional Reform Committee *Revisiting 'Rebuilding the House': the impact of the Wright reforms*, 3rd Report (2013-14 Vols.1 to 3) available at <http://www.Parliament.uk/business/committees/committees-a-z/commons-select/political-and-constitutional-reform-committee/inquiries/Parliament-2010/revisiting-rebuilding-the-house-the-impact-of-the-wright-reforms/>

¹⁶⁰ HLCC, *Relations between the executive, the judiciary and Parliament* (n26) at para 126

to elicit information to inform either specific inquiries into the justice system, or to help scrutinise the performance of the Lord Chancellor.

The purpose of inviting a judge to give evidence is also dependant on the remit and membership of the committee itself. Membership of committees are either solely drawn from the Commons, or the Lords, or jointly in equal numbers (as with the Joint Committee on Human Rights). It seems that the Lords Committees—and particularly the Constitution Committee—are perceived by judges to be more respectful of the judiciary and constitutional norms than those of the Commons.¹⁶¹ Yet judges have appeared most frequently before the House of Commons Justice Committee (HCJC) with sixty five appearances between 2003 and 2013 and just twenty two before the House of Lords Constitution Committee (HLCC).¹⁶² This becomes more important later in this chapter when we look at politicians, particularly MPs as members of committees, and their understanding of how they should hold judges to account. For now, it is only necessary to observe that an explanation for this difference is that the HCJC has a more focussed remit into the justice system than the broader constitutional issues investigated by the HLCC. This focus on the courts and judiciary are matters on which judicial expertise are more likely to be required.¹⁶³

¹⁶¹ One of the reasons suggested for Wall LJs refusal to appear before the Commons public accounts committee was the reputation of the committee and its chair- the ‘fierce’ Margaret Hodge MP- for being heavily critical of witnesses. Peers, compared to MPs, are well known for a more respectful and formal attitude

¹⁶² G Gee, R Hazell, K Maleson, P O’Brien, *The Politics of Judicial Independence in the UKs Changing Constitution*, (Cambridge: CUP, forthcoming) Chapter 6

¹⁶³ This is shown by comparing the subject inquiries of the two committees. The HCJC inquiries requiring judicial insight, where judges did appear to give evidence, have included: Scrutiny of operation of family courts 2006-2011; The creation of the MOJ 2007 to 2008; Scrutiny of legal aid reforms 2007-2011; Scrutiny of sentencing 2007-2011; scrutiny of coroner’s reforms 2006; tribunals 2006. HLCC inquiries requiring judicial insight, where judges appeared to give evidence, include: scrutiny of constitutional relationships 2006; scrutiny of judicial appointments process 2011

Most appearances taking place on an ad hoc basis to solicit advice or explanation on an educational basis. But as was hinted at above, some meetings have become more routine, such as the annual appearances before the HLCC of the LCJ, and the President of the Supreme Court. Routine meetings are not only needed to encourage regular communication, but also to allow Parliament to scrutinise judicial activity—particularly the leadership responsibilities of senior judges post 2005—and hold judges to account. The HLCC explored in depth, with evidence from Professors A.W.Bradley and V.Bogdanor, the details of how Parliament may hold judges to account.¹⁶⁴ In chapter one we explored how judicial independence requires that judges be free to preside over cases without pressure or influence placed upon them. Therefore judges cannot be directly accountable either to the executive or Parliament for their decisions in court. Instead, the justice system ensures the accountability and scrutiny of court judgments through: public court hearings; adversarial counsel; judicial rulings after submissions from counsel; and the appeals process to higher courts. Therefore Parliament has no business questioning the merits of an individual judge or their decisions.

So Parliament, as generally accepted, may not question judges on their decision making, judgments pending or prior, or of other judicial colleagues—and that is not of concern because a system of review and scrutiny exists by way of the appeals process. But speaking in a lecture which was picked up on and referred to by the select committee, Professor Bogdanor referred to how judges were accountable to Parliament in a way distinct to ministerial accountability.¹⁶⁵ The doctrine of the independence of the judiciary demands that judges not be held accountable or ‘blamed’ for decisions reached in court, whereas ministers

¹⁶⁴ HLCC, *Relations between the executive, the judiciary and Parliament* (n26) at paras 121 to 123 at page 40,

¹⁶⁵ V Bogdanor, *Accountability and the Media: Parliament and the Judiciary: The Problem of Accountability*, (2006) UK Public administration Consortium, available at <http://ukpac.wordpress.com/bogdanor-speech/>

are responsible and can be and are blamed for their departmental actions. This, the Professors suggested, is a form of sacrificial accountability to which government ministers must be held. On the other hand, judges can be questioned in order to invite an explanation of 'their lectures and articles in law journals, on their judicial philosophy, by a select committee'. This, being very different to sacrificial accountability, was labelled explanatory accountability.

The duty of Parliament to hold the judiciary to account in the explanatory sense has been accepted by the senior judiciary. The LCJ, SC President, and Divisional Presidents produce reports of their activities, administrative decisions and policies, budgets etc. and lay these reports before Parliament for scrutiny.¹⁶⁶ However, that is not to say that all judges share the same view as to the value and merit of committee appearances, or the levels of caution to be exercised when answering questions.

The Effect of New Administrative Responsibilities on Communication by Senior Judges

It is useful to note that the judiciary has commented both that judicial appearances before committees should not become too prevalent, but also that such appearances are useful and mutually beneficial.¹⁶⁷ At first sight it seems this judicial concern is for the preservation of

¹⁶⁶ Sometimes these reports may be annual, depending on the office holder. Lord Judge was known to produce reports annually. Lord Thomas purportedly stated he would do so "periodically". N.B. In the Supreme Court, the Annual Reports are primarily the responsibility of the Chief Executive and not the President. For the fifth, and most recent report of 2013-2014, see:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/319093/supreme-court-annual-report-2014.PDF

¹⁶⁷ See Lord Judge, The Lord Chief justice's Report 2010-2012, judicial Office 2012, paras 23-4, available at <http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Reports/lcjreport10-12.pdf> and Lord Neuberger, *Where Angels fear to tread* (n11)

the fundamental principle of judicial independence. The dangers associated with calling judges too frequently were highlighted by Lord Judge CJ in his report 2010-2012 (which we should note in passing is another means of extrajudicial communication with the political class as well as the wider public).¹⁶⁸ Lord Judge advised that committees should exercise care and caution when calling for evidence from judges so as not to damage the impartiality and reputation of the judges. This echoes the concerns aired by Lord Neuberger, set out at the start of chapter two, over the frequency and subject matter of extrajudicial comment. These concerns centre on the great significance attached to judicial independence and the separation of powers—that judges should not be seen to be colluding with politicians whether in fact or appearance. It seems that similar concerns led to the creation of the formal guidance relating to judicial appearances before Parliamentary committees from the JEB. Beatson LJ has suggested that: the comments of a judge giving oral evidence to a Parliamentary committee may, on occasion, damage their impartiality or the public perception of their impartiality. In addition, the ‘question and answer’ process is perceived by some judges as making it possible for politicians to press judges to comment on inappropriate matters.¹⁶⁹ An appearance before a committee also involves questions from MPs and peers that invite comment on a matter the judge or courts may later be required to decide while sitting in court. These judicial concerns all stem from procedural matters, relating to the format of committee appearances.

But Beatson LJ goes further than procedural matters, and suggests that judges should also be cautious over the substance of their comments. Parliament is made up of political parties,

¹⁶⁸ Lord Judge, The Lord Chief justice’s Report 2010-2012, Judicial Office 2012, (n167) paras 23-4

¹⁶⁹ Lord Phillips, *Judicial independence*, Commonwealth law conference, Nairobi, 12 September 2007 (n26)

so too, the issue of funding and budget cuts has become one of dispute between parties.¹⁷⁰ Specifically, the funding of the courts and justice system are the subject of political debate. Though this is not a new development,¹⁷¹ he states:

“The increase in the separation of powers and in the partisan nature of debates about the administration of justice tends to suggest that it may not be appropriate for judges to comment on certain matters upon which they have done so in the past.”¹⁷²

With judges no longer sitting as peers in Parliament, and administration of justice becoming a partisan issue and the subject of Parliamentary debate, there are things which judges can no longer be free to comment on extrajudicially. An example of this can be seen in the discussion of the next round of cuts to legal aid proposed by the coalition government earlier this year. These were publicly opposed by some opposition MPs in the chamber and the media.¹⁷³ In order to bolster the credibility of their criticisms of the government, MPs cited the concerns and opposition of senior judges as if they were in mutual support. For example David Lammy MP, writing in the independent dealt a blow to the government plans, and heavily criticised the proposed cuts. In the opening parts of his article he writes:

¹⁷⁰ For specific news coverage of disagreement between the main parties over legal aid, see: *Simon Hughes calls for review into children's access to legal aid*, The Guardian 24 September 2014 available at

<http://www.theguardian.com/politics/2014/sep/24/simon-hughes-review-children-access-legal-aid>

¹⁷¹ More generally see R Abel, *English Lawyers Between Market and State: The Politics of Professionalism*, (Oxford OUP 2003); A Geary, W Morrison and R Jago, *Chapter 10: The politics of the judiciary revisited: rights, democracy, law in The Politics of the Common Law: Perspectives, rights, processes, institutions*, (2nd Ed, Routledge Cavendish, 2014)

¹⁷² Beatson LJ, *Judicial independence and accountability: pressures and Opportunities*, Nottingham Trent University, 16 April (n26) page 18

¹⁷³ Shadow Justice Secretary J Khan, referred to in *Legal aid cuts criticised after underspend*, Guardian 26

November 2013, - <http://www.theguardian.com/law/2013/nov/26/legal-aid-cuts-underspend>

And David Lammy MP, Labour Backbencher, *Grayling's cuts to legal aid are both unnecessary and calamitous. Labour should reverse them*, The Independent 3 March 2014 -

<http://www.independent.co.uk/voices/comment/graylings-cuts-to-legal-aid-are-both-unnecessary-and-calamitous-labour-should-reverse-them-9166504.html>

‘I was adding my voice of opposition to that of the chair of the Supreme Court, the Law Society, the Bar Council, the Council of Her Majesty’s Circuit Judges, ... The Government’s response to its subsequent second consultation was, sadly but unsurprisingly, to ignore us all.’

This statement gives the appearance that the judiciary and the Labour Party are agreed in their opposition to the government. This sort of comment is inappropriate, and suggests collusion between the judges and David Lammy MP. Whilst some matters may be ‘too political’, as defined by Beatson LJ above, and thus prevent judges from commenting extrajudicially, other matters have undeniably been brought under the responsibility and leadership of senior judges. For example, though funding and administration may have become a partisan political issue, so too have they been brought under the duties of the LCJ. It is necessary then for Beatson LJ to qualify his above statement. He observes that:

‘matters upon which comment by the Lord Chief Justice or his delegates would have been inappropriate in the past, are now appropriate, in part because of the legitimate interest in explanatory accountability for the judiciary’s part in the new partnership.’

So as a result of the CRA and recent political proposals for cuts, some matters must be avoided by judges to maintain their impartiality. However, other matters have been undeniably placed under the responsibility of the LCJ and his officials upon which he must

comment.¹⁷⁴ On proper scrutiny of both the government proposals and judicial comments, the qualification as explained by Beatson LJ becomes clear. The government cuts to legal aid and funding will impact on several things, including the pay of barristers and counsel. This is a concern for the legal professionals, who want a tenable salary, but also for judges for entirely different reasons. Modern judges are now more involved with case preparation and management. A judge is expected to ensure that cases are ‘trial ready’, that all documents, notices, evidence bundles and procedures, are prepared and submitted by counsel, and if they are not done, then judges must set deadlines or impose penalties until they are. These case management duties are intended to ensure the justice system is efficient in processing and hearing cases and trials.¹⁷⁵ Furthermore, the LCJ as head of the judiciary is charged with responsibility for court business, management and administration.¹⁷⁶ If the standard of legal professionals falls, or more and more lay-defendants choose to appear as litigants-in-person, then there is a risk that the whole judicial process will slow and become inefficient. Importantly, this will place a greater burden on the judiciary requiring them to be more proactive in case management. Given the demands already placed on a judge’s time, with case preparation, hearings, reading days, and extrajudicial activity such as outreach, these cuts are of concern to judges and the LCJ responsible for court management—not solely the pay of barristers per se. In David Lammy’s piece, his criticism of the cuts centres on the effect on the legal profession and the bar in terms of access and elitism—a profession only for the rich. So even though both he and senior judges have reservations about the government plans, they are in fact for different reasons. David Lammy criticising the restriction of access

¹⁷⁴ But also any senior judge. We saw in Chapter One how Lady Hale spoke of the dangers of legal aid cuts, and how Lord Neuberger subsequently defended those comments as central to the issue of the administration of justice, and therefore not inappropriate

¹⁷⁵ For a discussion of the challenges faced by judges, and first-hand accounts from interviews, see P Darbyshire, *Sitting in Judgment: The Working Lives of Judges*, (Oxford: Hart Publishing 2011)

¹⁷⁶ The Constitutional Reform Act 2005, s.7

to the bar, and elitism of conservative ideology, and the judiciary concerned for the efficiency of the justice system. This will need to be an additional consideration in undertaking the analysis in Part B of this chapter—are any of the comments made by judges on matters of administration of justice inappropriate or partisan, or are they specific to the justice system?

The Constitution Committee looked at the relationships and means of communications between the branches of government.¹⁷⁷ They noted that committee appearances were important in holding judges to account by questioning in public.¹⁷⁸ The committee also indicated, again, the importance of judges speaking in an educative capacity, on broad academic issues such as the use of comparative law, or the interpretation of precedent case law.¹⁷⁹ This is also an explicit acknowledgement by a Parliamentary committee that Parliament, at least, takes note of judges extrajudicial activities, and may on occasion seek to probe the views expressed in academic and educational lectures and articles which are already in the public domain.¹⁸⁰

Reasons for the Negative Judicial Attitude to Committee Appearances

We saw in the above section on judicial attitude towards committee appearances that, from the LCJ and the SC President to judges of the High Court, the increased attendance by judges is a cause for concern. The reasoning adopted ranged from concerns over judicial independence, the public perception of judicial impartiality, and the large-scale time

¹⁷⁷ HLCC, *Relations between the executive, the judiciary and Parliament Report*, 2006 (n26)

¹⁷⁸ Ibid, at para 124

¹⁷⁹ Ibid, at para 125

¹⁸⁰ Following several public speeches by Wall LJ criticising cuts to the family courts and child care provision, the Public Accounts Committee was keen to hear more about Wall LJ's concerns. We will look at this specific example later in this chapter

commitment and preparation required to be undertaken by judges. A significant possibility is that some senior judges still hold outdated perceptions of the workings of Parliament.

One argument against judicial appearances becoming too frequent was that judges should not be, either in fact or appearance, seen to be colluding with politicians. We have already noted a significant shift in focus of Parliamentary work from the chamber to the committee rooms. So too we have seen and will continue to look at the importance of the JEB Guidance prepared following discussions and agreement with Parliamentary officials. It should also be noted that committee sessions are broadcasted, recorded and published in the public domain. Therefore, with all these safeguards, there should be no bar to judicial appearances becoming frequent (as necessary) on this front. Even if there were concerns over public perception over impartiality of judges, the public nature of committee appearances means that these claims can be investigated.

Committee evidence seems no longer to be an interrogation of judges by committees, as they were once perceived by some judges,¹⁸¹ but perhaps better described as a ‘dialogue’ between Parliament and judges. Dialogue is used here in the literal sense, referring to mutual communication between judges and politicians, going both ways.¹⁸² Frequently, this takes the forms of politicians seeking judicial expertise and judges seeking to explain their thoughts or concerns on the subject of the inquiry. Rather than interrogatory, these dialogues are often a valuable opportunity for judges to learn from politicians on how to better handle their

¹⁸¹ For example, in 2009 and 2010 Sir Nicholas Wall LJ was reluctant to appear before the Public Accounts Committee of the Commons, inquiring into childcare in the family courts due to its perceived fierce nature and past history of being critical of witnesses

¹⁸² Dialogue is often taken by Public Lawyers to refer to “dialogue theory”. For an account of “dialogue theory”, to which this thesis does not refer, see TR Hickman, *Constitutional Dialogue, Constitutional Theories, and the Human Rights Act*, (2006) PL 722. This thesis uses dialogue in a literal sense instead, following the approach of Alan Paterson, see: A Paterson, *Final Judgment: The Last Law Lords and the Supreme Court*, (Oxford: Hart Publishing 2013)

increasingly public and administrative roles. For example, the practice of annual press conferences by the LCJ was, in part, a result of recommendations made by the HLCC.¹⁸³ It was reported that at the first such conference with Lord Phillips as LCJ in 2005, ‘the media questioning of him [was] designed to elicit some remarks [which would] enable the story to be ‘Lord Chief Justice at odds with’ or ‘Fury at’ ... the Government’.¹⁸⁴ In reading through the press conference of 2011 we see a marked change however, as answering is more easily refused; though perhaps the press are no better behaved they are certainly better handled.¹⁸⁵ This example demonstrates just how the senior judiciary can also benefit from judicial appearances; here benefiting from the political class’s better understanding of, and more established relationship with, the press.

Such dialogues can only be a positive step forward for the judiciary—working with rather than being interrogated by Parliament. For judges this allows them to draw on their experience and expertise to educate MPs and peers about the justice system and legal theory. More importantly, where government fails to consult relevant judges in policy making, a committee may highlight that fact and allow a judge to then communicate their concerns and subsequently include those comments in the final report.¹⁸⁶ This would then, indirectly, relay the judges concerns to all MPs and peers.

¹⁸³ In 2007 the committee suggested to the LCJ that he improve his public communications and relations, HLCC, *Relations between the executive, the judiciary and Parliament* (n26) paras 160, 171

¹⁸⁴ HLCC Ibid Para 158

¹⁸⁵ Lord Chief Justice, Press Conference at the RCJ, 2011, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/News%20Release/lcj-press-conference-270912.pdf>

¹⁸⁶ For example, the House of Lords Select Committee on the Constitution made a strongly worded report on the constitutional implications of the creation of the MoJ, and the significant failure of the government to properly consult the judiciary: HLCC, *The Process of Constitutional Change*, 15th Report (2010-12 HL Paper 177) para 43, and 122, available at <http://www.publications.Parliament.uk/pa/ld201012/ldselect/ldconst/177/177.pdf>

However, it seems that on occasion the partisan nature of subject matters may also affect the level of interest among MPs, as one study reported that clerks struggled to find enough members to make a committee quorate for an early appearance of the LCJ before the HCJC.¹⁸⁷

Guidance to Judges Appearing Before Parliamentary Committees

The items for consideration in the JEB Guidance are reproduced below:¹⁸⁸

Item I. The merits of individual cases, whether or not the judge giving evidence has adjudicated on that case, and whether these are pending, ongoing, or have concluded *[except where questions relate to legal theory of cases or jurisprudence]*;¹⁸⁹

Item II. The personalities or merits of serving judges, politicians, or other public figures, or more generally on the quality of appointments;

Item III. The merits, meaning or likely effect of provisions in any Bill or other prospective legislation and the merits of government policy *[except where such provisions may affect the administration of justice or work of the courts]*;¹⁹⁰

Item IV. Issues which are subject to government consultation on which the judiciary intend to make a formal, institutional response, but have not yet done so.

¹⁸⁷ Politics of Judicial Independence, (n162)

¹⁸⁸ Paragraph 3 of the JEB Guidance (n138), emphasis added.

¹⁸⁹ This exception is set out in paragraph 7 of the JEB Guidance (n138)

¹⁹⁰ This exception is set out at paragraphs 12 and 13 of the JEB Guidance (n138)

Items I and III contain important exceptions which we must take note of, while items II and IV might be considered straightforward. Item II prevents any demonstration of discord or animosity between judges, and Item IV precludes questions which might force a judge to comment where a collective judicial response is being prepared.

Item I prevents any discussion of judicial decisions in court, subject to an important exception. The exception is that evidence may be taken on issues relating to the jurisprudence or legal issues in cases, where the questioning is of a purely educative nature. This exception is not only expected, given the value of judges comments on jurisprudence with regard to their wealth of experience, but also identifies one of the main reasons for judicial committee appearances, as we will see.

Reinforcing the principle of the separation of powers, Item III requires judges to avoid commenting on government policy. In line with the approach followed by Lord Neuberger on extrajudicial speechmaking, there is another exception.¹⁹¹ That is where government policy, or a proposed bill, will affect the administration of justice or the work of the courts, then judges should be free to comment as far as it is appropriate to do so.¹⁹²

¹⁹¹ Lord Neuberger, *Where Angels fear to tread* (n11) page 12 para 44

¹⁹² Examples of Judges commenting on bills before Parliamentary Committees include most obviously an array of appearances before the special House of Commons Committee for Constitutional Affairs (renamed to Justice Committee in 2007). Judges who chose to appear include: Lord Mackay (November 2003 HC1105-i), Keith LJ and Lord Bingham (May 2004 HC 628-ii). More examples, see: Lord Phillips, HCJC Inquiry into the Administration of Justice 2007-2008,, Q23, available at <http://www.publications.Parliament.uk/pa/cm200708/cmselect/cmjust/913/8070203.htm>; Mackay LJ, Joint Committee on Privacy and Injunctions inquiry, draft defamation bill, 2011-2012, Q937-987, available at <http://www.Parliament.uk/documents/joint-committees/Privacy-and-Injunctions/JCPIWrittenEvWeb.pdf>

These guiding principles are an official way of attempting to regulate a formal, public means of communication with Parliament. The guidance is crafted to ensure the upholding of the principles of the separation of powers and judicial independence and allow for valuable interactions and inquiries to take place. Whilst similar in content to Neuberger's guidance, Neuberger's seven principles are an informal statement of matters he believes judges should consider before speech-making. We saw in chapter two how speeches may be made to target a particular audience, such as Parliament or the executive, and while members of either body may be present in the audience (such as MPs in the inns of court or university research units), the speeches do not directly address Parliament or the executive. Oral evidence sessions are a direct means of communication, recorded and used in final reports to Parliament and the government. Both are important means of communication in their own way, and they both raise similar concerns for core constitutional principles. It makes sense then that the guidance of the JEB and Neuberger are along similar lines. The only minor difference is the more procedural nature and notice of the guidance for oral evidence than the seven principles for speech-making.

Parliamentary Rules and Conventions: Duties of Committee Members

A committee appearance by a judge also places duties on the committee members themselves. As Parliamentarians they are subject to Parliamentary rules and conventions. Unlike the indirect communication of extrajudicial speeches, oral evidence is a process of dialogue where formal guidance exists to regulate both judges and politicians taking part. These Parliamentary rules and conventions are not only necessary to maintain judicial independence and a separation of powers, but they aid productive interactions by allaying any fears judges may have of inappropriate questioning by MPs and peers. The importance

of these rules to ensuring constitutional propriety and good communication is also indicated by the importance attached to them. The rules are explicitly set out in a written briefing note circulated to committee members prior to the hearing, either by the clerk or chairperson, and restated at the start of each evidence session by the chair.¹⁹³

An important Parliamentary rule is the sub judice rule. Elucidated by the Speaker of the House in a heated debate in 1976,¹⁹⁴ the rule is now set out in the standing orders of both Houses.¹⁹⁵ The rule forbids any reference, whether made in the chamber or committees (areas otherwise protected by Parliamentary privilege), to cases which are active in the courts. Active is then somewhat broadly defined by the resolution depending on the type of hearing, often stretching from the point at which it is clear that court involvement will occur (such as the moment papers are filed or the a court date decided).¹⁹⁶

The JEB Guidance to judges highlights the importance of the sub judice rule to judges stating that ‘the convention promotes the dignity of the judicial office, the finality of judgments, and, most importantly, the independence of the judiciary’.¹⁹⁷ The convention importantly imposes a temporal restriction on Parliamentary activity, allowing for questions and inquiries into the jurisprudence of cases that have been decided, but precluding questions into active legal proceedings. Therefore, some issues which are the subject of active legal proceedings

¹⁹³ Cabinet Office Memorandum, Departmental Evidence And Response To Select Committees, July 2005 Paragraphs 71-72 available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61192/guide-deptal-evidence-and-response-to-select-committees.pdf

¹⁹⁴ HC Deb 29 July 1976 vol. 916, col. 649 and again at 882, available at <http://hansard.millbanksystems.com/commons/1976/jul/28/sub-judice-rules>

¹⁹⁵ HC Deb, 15 November 2001, c1012

¹⁹⁶ Procedure Committee, *The Sub Judice Rule of the House of Commons*, (2004-05 HC 125), paragraph 28

¹⁹⁷ Paragraph 4 of the JEB Guidance at (n138)

may not be subject of the committee's inquiry, whether or not the issue is relevant or important to it.

The explanation of accountability given above by Professors Bogdanor and Bradley already reason and justify this. Judges are not accountable in the sacrificial-ministerial sense, but the explanatory sense. Therefore questions of the kind envisaged above are forbidden by Parliamentary convention. However that does not limit the power of Parliament in any way. In 2009, the Commons Culture, Media & Sport Committee conducted an inquiry which in part considered the judgments of Eady J following allegations that his judgments departed from precedent in privacy law. Here the committee was able to perform its function and conduct its enquiry without calling judges to give evidence. This meant that any lines of questioning relating to the merits of the cases and the merits of Eady J as a serving judge were avoided.

In 2004 the Commons Procedure Committee looked at the need for the sub judice rule and its perceived effect in limiting the power and discretion of Parliament. The report also pointed out that the rule itself provided that the sub judice rule could be disapplied by the discretion of the Speaker in certain instances—though it also pointed out this had never been exercised. The report was at times strongly worded suggesting that the rule does not prevent Parliamentary activity, rather it 'delays' it, and that 'delay can run for several years'. Indeed the report encourages Parliamentarians to apply for the Speaker to use his discretion to disapply the rule where whenever they feel the rule is 'unreasonably impeding the work of Parliament'. Despite all this, the report concluded that no changes be made, but reserved the right to return to the subject matter if occasion required it. This was fortunate since any attempt to subvert the sub judice rule, particularly when a case is ongoing and regardless of

the length of time, will have serious implications. A damaging implication would be to open up the possibility of politicians interfering with the impartiality of the presiding judge (and in some cases and/or the jury) thus preventing the chance of a fair trial or hearing.

Part B: Classification of Judicial Oral Evidence

Chapter two offered a tripartite approach to classifying extrajudicial lectures. We will now take the same approach with oral evidence before Parliamentary committees.

Using the three-limb classification process we will see that judges may be called by a variety of committees. But the judge can always refuse to attend. The judge will typically be one of the senior judiciary as set out earlier in this paper, but sometimes others may be called. The form of the evidence normally takes the form of oral evidence to questions. Though written evidence may sometimes be tendered in addition to, or instead of, oral evidence. The substance of that evidence varies significantly depending upon the subject matter. It is here that the most significant findings are expected to be made as we observe the tone and substance of a judge's evidence, sending sometimes subtle and otherwise clear warnings to the government. Such warnings are also often reiterated in the select committees published reports. This helps to show that select committees have become more than a tool for the accountability of the judiciary, and more than a mere talking shop to make judges feel involved and consulted. Rather, they now serve as an intermediary, ensuring that the judiciary are heard in the chamber and government.

For the purposes of classification, the selected sample includes:

1. Lady Hale and Sir Maurice Kay, Joint Committee on Human Rights inquiry into ‘should the UK have a bill of rights?’, Examination of witnesses Questions 191 to 235, Tuesday 4 March 2008¹⁹⁸
2. Lord Judge, The Lords Select Committee on the Constitution, Annual Evidence Session, Evidence Session No. 1 Heard in Public Questions 1 to 32, Wednesday 30 January 2013¹⁹⁹
3. Lord Neuberger and Lord Hope, The Lords Select Committee on the Constitution, Evidence Session No. 1. Heard in Public. Questions 1 to 28, Wednesday 13 February 2013²⁰⁰
4. Sir Nicholas Wall, House of Commons Public Accounts Committee, CAFCASS inquiry, Examination of Witnesses, Questions 96 to 127, Tuesday 12 October 2010.²⁰¹

¹⁹⁸ An uncorrected transcript (neither Committee Members nor witnesses have had the opportunity to correct the record) can be viewed at: HC 150-iv, <http://www.publications.Parliament.uk/pa/jt200708/jtselect/jtrights/uc150-iv/uc15002.htm>

¹⁹⁹ An uncorrected transcript (neither Committee Members nor witnesses have had the opportunity to correct the record) can be viewed at: <http://www.Parliament.uk/documents/lords-committees/constitution/lordchiefjustice/300113LCJtranscript.pdf>

²⁰⁰ Available at: <http://www.Parliament.uk/documents/lords-committees/constitution/President%20Supreme%20Court/130213sctranscript.pdf>

²⁰¹ Available at: <http://www.publications.Parliament.uk/pa/cm201011/cmselect/cmpubacc/439/10101201.htm>

Speakers

Of these speakers Lady Hale, Lord Hope and Lord Neuberger are also mentioned in chapter two on speeches. But something must also be said specifically about their appearances before Parliamentary committees. Lord Neuberger is currently the President of the Supreme Court, and Lord Hope was formerly, and is now succeeded by Lady Hale as, the Deputy President of the Supreme Court. The particular session with Lord Hope and Lord Neuberger is now an annual affair, one of regular contact between the UKSC and the HLCC.

Lord Judge has, as the head of the judiciary in England and Wales since the CRA 2005, been called to give evidence more times than any other judge. Lord Judge, as mentioned above, has also repeatedly advised caution when it comes to extrajudicial comment and the impact that might be had on individual and institutional judicial independence. However, the LCJ appearing on an annual basis to give evidence has been stated by the HLCC as a useful means of holding the judiciary to account by asking questions publicly, and allowing scrutiny as to the extent or nature of their work. The session may also allow committee members to hear updates from the LCJ and make inquiries into the constitutional issues faced by the judiciary.²⁰²

Sir Maurice Kay LJ is the Vice-President of the Court of Appeal Civil Division, and on this occasion appeared alongside Lady Hale to discuss whether the United Kingdom required a bill of rights.

²⁰² HLCC, *Relations between the executive, the judiciary and Parliament* (n26) para 124

Finally, Sir Nicholas Wall LJ, as President of the Family Division, though also referred to in the second chapter, has also been included here speaking on family law matters and the funding of CAFCASS. Wall LJ has also made three speeches on the subject during his time in office,²⁰³ but has made more efforts over family court funding in private correspondence and letters to the government and Legal Services Commission.²⁰⁴

Form

The form of these extrajudicial comments come as oral evidence to a Parliamentary committee; three to the HLCC; two to the Joint Committee on Human Rights (JCHR); and one to the House of Commons Public Accounts Committee (PAC). We earlier noted that most judicial appearances are before the HCJC, and it may seem odd that the HCJC does not then appear in the sample. However, we also noted that the remit of the HCJC differs from that of the HLCC since the HCJC narrowly inquires into the particulars of the justice system, whereas the HLCC broadly investigates the constitutional issues, and here, the constitutional arrangement of the judiciary. It is those constitutional issues, affecting the administration of justice and communication between the branches of government, which are more important to this thesis, than jurisprudential discussion over things such as Sentencing Guidelines before the HCJC.

²⁰³ Wall LJ, *Is The Family Justice System In Need Of Review?*, Coventry 2010, available at http://www.familylaw.co.uk/system/uploads/attachments/0001/1218/President_of_the_Family_Division_speech_-_19th_September_2010.pdf

²⁰⁴ *Family Court System Could Implode, warns its top Judge*, Telegraph 7 August 2010 <http://www.telegraph.co.uk/news/uknews/law-and-order/7931918/Family-court-system-could-implode-warns-its-top-judge.html>

The HLCC was first created in 2001 and is charged with reviewing the constitutional implications of all public bills, and keeping under review the state of the constitution.²⁰⁵ The composition of the committee draws on members of all parties and cross benchers in the Lords, and is chaired by a senior Conservative member, Lord Lang of Monkton. Its members include prominent politicians and lawyers, such as former Attorney General Lord Goldsmith. Such figures are not only estimable but also well respected in Parliament and perhaps also in government. Despite the caution earlier expressed by Lord Judge, for the senior judges to accept to attend their annual sessions should be considered a mark of judicial approval for the system. This is perhaps the only chance each year for the LCJ, UKSC President, and Deputy President, to appear in Parliament and make representations, not on a detailed subject upon which they have been ‘invited’, but with a chance to bring their own agenda. These appearances are unique in that there is not one specific line of inquiry here. Instead, the senior judges are expected to discuss a variety of things, such as update the committee on the work of the courts, their own administrative tasks, and any issues they may wish to discuss. It is also a chance to do so before senior figures that produce influential reports; the Constitution Committee cannot be ignored lightly (the actual success and reality of this is studied in the next chapter).²⁰⁶

The JCHR, also set up in 2001, is made up of twelve members drawn from the Commons and Lords and is tasked with considering human rights issues in the UK.²⁰⁷ The inquiry by the JCHR in our sample concerned the need for, and suitability of, a bill of rights in the

²⁰⁵ As stated on their homepage, <http://www.Parliament.uk/hlconstitution>

²⁰⁶ A detailed discussion of the role, work, history and changing composition of the HLCC can be found at J S Caird, *Parliamentary constitutional review: ten years of the House of Lords Select Committee on the Constitution*, (2012) PL 4

²⁰⁷ More information, and a comparison with work of similar bodies to the JCHR in other countries, can be found at C Evans and S Evans, *Legislative scrutiny committees and Parliamentary conceptions of human rights*, (2006) PL 785. See also: F Klug and H Wildbore, *Breaking new ground: the Joint Committee on Human Rights and the role of Parliament in human rights compliance*, (2007) EHRLR 231

UK.²⁰⁸ Its members included the influential late Earl of Onslow who had served with distinction on the committee, criticising then Home Secretary Jacqui Smith's attempts to extend detention periods.²⁰⁹ In the selected session, the committee sought the views of Kay LJ and Lady Hale in their inquiry into a Bill of Rights for the UK.

Finally, the PAC was, according to their website, 'appointed by the House of Commons to examine 'the accounts showing the appropriation of the sums granted to Parliament to meet the public expenditure, and of such other accounts laid before Parliament as the committee may think fit' (Standing Order No 148)'.²¹⁰ The PAC is known to be one of the most rigorous of committees, famed for closely probing its witnesses.²¹¹ This particular inquiry involving Wall LJ related to the government cuts and reforms of groups supporting the work of the family courts such as the Children and Family Court Advisory and Support Service (CAFCASS). CAFCASS is concerned with the interests of children involved in proceedings before the family courts. It works with, and prepares reports on, children and their families and then advises the courts on what it considers to be in the child's best interests.

So here we have examples of senior judges before powerful and influential committees. We expect the judges will use this opportunity to make themselves heard and not just be

²⁰⁸ For more on this, see; J Stratford, *Joint Committee on Human Rights report, A Bill of Rights for the UK? Proposed approach to social and economic right*. (2009) JR 35

²⁰⁹ The hearing where the JCHR took then Home Secretary Jacqui Smith to task over 42 day detention periods, can be found in an uncorrected transcript (NB neither witnesses nor Committee Members have had the opportunity to correct the record. The transcript is not yet an approved formal record of these proceedings) at JCHR, *Human Rights Issues Relating to the Home Office*, October (2008-2009 HC 1142-i) available at <http://www.publications.Parliament.uk/pa/jt200708/jtselect/jtrights/uc1142-i/uc114202.htm>; Press coverage of the hearing can be found at, *Smith attacked over 42-day speech*, BBC 28 October 2008, available at http://news.bbc.co.uk/1/hi/uk_politics/7695695.stm

²¹⁰ For further information on the work of the committee see: I Campbell, *A tale of two committees* (2013) Tax 8

²¹¹ For a recent example see: *Public accounts committee slams Department for Transport amid road user dissatisfaction*, Construction News 25 September, 2014

questioned by the committee. It is here then that the substance of the inquiries is most revealing.

Substance

It has been suggested that the safest course of action when a judge is called to give evidence is to ask questions of an educational nature—an inquiry into the role and work of the judge and courts of which the judge has experience—so as to avoid political issues and matters upon which the judge might one day be expected to preside over.²¹²

We see from Lord Judge's evidence that for the most part this is true - in particular on the issue of diversity in the judiciary²¹³ and on cameras in courts.²¹⁴ On the subject of diversity of the judiciary, Lord Judge sets out statistics—ninety community judges working on outreach in schools and universities; two senior liaison judges for diversity; 2000 participants in the judicial work shadowing scheme; and the female/male percentages of the bar and partners in solicitors firms. He also explains the significance of those, in turn, educating and informing the committee of the status quo, and the steps he, and his team, have been taking to improve the diversity of the judiciary.

On the topic of cameras in court however, Lord Judge goes further and comments on prospective legislation. The then Crime and Courts Bill contained a provision allowing the Lord Chancellor, with the approval of the Lord Chief Justice, to allow filming in the Court

²¹² Le Sueur *Parliamentary Accountability, and the judicial System* in Leyland and Bamforth, *Accountability in the contemporary constitution*, (OUP 2013) page 211

²¹³ HLCC (n199) Q10

²¹⁴ Ibid Qs15 and 16

of Appeal, and sentencing in the crown court. Lord Judge comments on the provision advising caution on allowing filming in the Court of Appeal, but takes a ‘very strong view about sentencing’.²¹⁵ These strong views are eloquently put to the committee, advising that they consider the implications for the defendant, the victims and the victims’ family in the gallery.²¹⁶ But Lord Judge goes further to advise that the committee members insist, when the Bill passes through the Lords, that the clause maintain the key proviso, ‘with the approval of the Lord Chief Justice’. Lord Judge ‘hope[s] that [the committee members] will accordingly troop through a lobby’ that permission from the Lord Chancellor to allow filming in court should require the ‘concurrence’ or ‘agreement’ of the Lord Chief Justice. Allowing filming in courts inevitably affects, and has the potential to disrupt, the administration of justice (as argued by Lord Judge). Therefore it is constitutionally acceptable for the Lord Chief Justice to argue for peers to ensure that their agreement should be required for any grant of permission to film. Influencing legislative debate in this way is not new, and is reminiscent of the concordat negotiations pre-2005 between Lord Woolf and Lord Falconer, and the less successful negotiations by Lord Phillips over the duties of the Supreme Court Chief Executive. Instead, this example shows how Lord Judge, deprived of the right to address the Lords and lobby for an amendment during any debate over the Crime and Courts Bill, must instead request the support of an influential Parliamentary committee to assist. The JCHR subsequently adopted his view to maintain the requirement for agreement from the Lord Chief Justice.²¹⁷ But more so, Lord Lester of Herne Hill, a member of the committee during the inquiry, and Lord Judge’s evidence, argued and moved further amendments to the

²¹⁵ Ibid Q15

²¹⁶ For more discussion of the issues around filming in court, with accounts of the practice in Scotland, and the situation in England & Wales, see: R Shiels, *The Live Televising of Court Proceedings* (2013) SCOLAG 260

²¹⁷ House of Lords, House of Commons, Joint Committee on Human Rights, *Legislative Scrutiny: Crime and Courts Bill*, 5th Report (2012-2013 HL Paper 67, HC 771) at page 17 paragraph 50, available at <http://socialwelfare.bl.uk/subject-areas/government-issues/legislation/tso/14115767.pdf>

clause²¹⁸ attempting to add more safeguards and checks on the Lord Chancellor's power to grant permission.²¹⁹ Though none of these were successful, they demonstrate the importance of the influence of, and good relations between, the senior judiciary and senior politicians.

But there are other comments made by Lord Judge that are significant for a variety of reasons. Lord Judge makes clear who he is speaking to when he attends these sessions, albeit at a late stage. Lord Judge says, 'so that the committee can be told, and in effect Parliament can be told'.²²⁰ This acknowledgement by Lord Judge that he is using the committee to tell Parliament what he thinks, coupled with the advice to the JCHR on what position to take in Parliamentary debates over allowing filming in courts, suggests that Lord Judge considers himself disadvantaged by not being able to make direct representations to the chamber. This is further suggested when in the 'non-opening statement' Lord Judge remarks that something has been 'lost' and the process of constitutional evolution was only begun, not completed, by the CRA 2005, as there is no 'direct speech from the Lord Chief Justice to those responsible for producing the legislation: Parliament'.²²¹

In substance Lord Judge, on another two occasions, continues to go much further than the educative role. Firstly Lord Judge delivers what can only be called a hurtful truth to government action and misgivings about judicial review, stating that judicial review is 'only an inconvenience to those who have failed to do their job lawfully'.²²² In so doing Lord Judge cannot be said to have spoken out of turn. Judicial review is a judicial process. Its oversight

²¹⁸ The Crime and Courts Bill Clause 22(3), now the Crime and Courts Act 2013, s.32

²¹⁹ HL Deb, 10 December 2012, c861 - 870

²²⁰ HLCC (n199) Q12

²²¹ Ibid Q2

²²² Ibid Q8

and administration is led by the Lord Chief Justice, as head of the judiciary.²²³ Any constraints placed upon it by legislation are and should be of concern to the judiciary as an institution. Therefore, despite the fact that Lord Judge's extrajudicial comments on judicial review and relevant reforms are more critical and policy-orientated than educative, they are nonetheless appropriate observations from the head of the judiciary.

Secondly Lord Judge goes so far as to set the agenda for the Constitution Committee. Lord Judge sets out his concerns that there is still some way to go on constitutional reform and invites the committee to consider very specific issues which are of concern to him.²²⁴ The Chairman, Lord Goodlad, goes so far as to say 'You have certainly provided a wide agenda for us to look at in subsequent sessions'. Arguably the Lord Chief Justice should be able to lay his concerns before Parliament, and request and inquiry and/or debate over the issues raised. After the CRA, there is no power to directly enable the Lord Chief Justice to do that. Instead, by adapting, Lord Judge is able to use Parliamentary committees to help to fill the gaps left by the CRA.

Contrast this with the evidence given by the President and then Deputy President of the Supreme Court two weeks later. At the educative end of the spectrum, the two judges provide a comprehensive outlook on the devolution issue and the potential for a Scottish supreme court and Welsh justices.²²⁵ The judges also give their views on full and part-time work by judges in the courts and the implications of that,²²⁶ and also on the use of cameras in courts.²²⁷ But they do not go so far as to advise the peers how to behave in subsequent Parliamentary

²²³ The Lead Judge of the Administrative Court, answerable to the LCJ, is Mr Justice Andrew Collins

²²⁴ HLCC (n199) Q2

²²⁵ HLCC (n199) Qs10-12

²²⁶ Ibid Q16

²²⁷ Ibid Q20

debate, nor do they deliver a ‘hurtful truth’ on judicial review as Lord Judge did. The same issue of constraints and reform of judicial review was raised in this session of evidence.²²⁸

Lord Hope invites caution on any legislative action and states that as a matter for the administration of justice, judges should be allowed to do all that they can to improve the situation, before legislation is considered.²²⁹ Lord Neuberger then seems to echo the word of caution. As Lord Neuberger rightly points out, judicial review is for the most part conducted in the Administrative Division at the Royal Courts of Justice, and so the Lord Chief Justice is better placed to comment.²³⁰ Perhaps, because of the important leadership role of the Lord Chief Justice, that is why Lord Judge was more outspoken and critical of the proposed reforms than Lords Hope or Neuberger.

We see from these two examples a shared approach of caution among the judges in answering questions, and mutual understanding and respect between the committee members and the judges appearing as witnesses. However, not all judges will agree on what is appropriate when it comes to making extrajudicial comment. For the large part, the evidence of Lady Hale and Sir Maurice Kay LJ was informative and educative of the law as it applies to grounds of judicial review, and the history of British civil liberties dating back to before the days of Sir Edward Coke CJ. Further, the joint committee drew on their expertise to inquire about foreign jurisdictions and how declarations of incompatibility, or their equivalent operated elsewhere. The Earl of Onslow asks of Lady Hale:²³¹

²²⁸ Ibid Qs 13 to 15

²²⁹ Ibid Q13

²³⁰ Ibid Q14 and 15

²³¹ JCHR (n201) Q201

Do you think there are rights which are missed out by the Human Rights Act which should be protected by a Bill of Rights?

To which Lady Hale replies:

A sort of shopping list of things that one could expand into?... I could give you two things from my shopping list, but it is a purely personal opinion...

Lady Hale proceeds to elaborate on the two rights that she would see enshrined in law.²³²

However when the same question is put to Kay LJ, he responded:

I do not have a shopping list and if I had it is one that I might not find it comfortable to disclose. You are really asking how the Human Rights Act should be amended or what a Bill of Rights should include. With respect, they are political questions for others to answer.²³³

From the viewpoint of Kay LJ, the evidence before this committee departed from the educative purpose and Lady Hale went so far as to express opinions on political and legislative questions which he found he could not do. Lady Hale is a senior judge, and works in a higher court than Kay LJ, and as we noted in the previous chapter we see that Lady Hale has extensive experience of commenting extrajudicially.²³⁴ But why the difference of opinion, and was it significant that the approaches were not the same? The question invited

²³² Ibid Qs201-205

²³³ Ibid Q205

²³⁴ Lady Hale also submitted written evidence to, and appeared before, the HLCC, in their inquiry into the judicial appointments process. Further, in speechmaking, Lady Hale has given 21 speeches since 2009 (n70)

suggestions as to whether or not the Human Rights Act had any omissions. This is an open question which can be interpreted as legal or political. Is this statute complete, and workable?—that is the legal question. Or if you had the power to legislate, how would you change the HRA 1998?—that is the political question. The second question raised issues of judicial independence, but perhaps it is safe to say that it did so only on an individual level. Lady Hale clearly thought that her own independence was not, nor that of the judiciary, was at stake. But Kay LJ did feel that this was a matter for ‘others to answer’ as essentially inviting his thoughts on the omissions of legislation passed by Parliament, and going further to suggest future considerations for the Parliamentary programme to address those omissions. These differing personalities and attitudes of judges were also investigated by a study into the Politics of Judicial Independence.²³⁵ The authors describe the experience of one of their interviewees when dealing with two different judges due to attend the same evidence session.²³⁶

‘judge A ‘fell over themselves’ to come and give evidence, while judge B was ‘far less happy’ and the committee clerk had to ‘talk to judge B on the phone to go through in painstaking detail’ what the committee was going to ask.’

These differences in attitude of course depend on the judge, but also perhaps reflect the perceptions of individual judges on the role and importance of engaging with Parliamentary committees. Of course fundamental principles such as the sub judice rule and judicial independence should not be compromised. But since the setting aside of the Kilmuir Rules by Lord Mackay, individual judges have been free to determine when they should comment

²³⁵ Politics of Judicial Independence (n162)

²³⁶ Ibid, (forthcoming)

and what they should say. Some disparity is then to be expected, and this spectrum of the willing to the unwilling demonstrates that.

That individual judges might have different views about committee appearances is also shown with the last session in our sample. As noted above the PAC is renowned for its fierce reputation, particularly the intense level of scrutiny led by its chair, Margaret Hodge MP. Her reputation recently made headlines when senior Conservative figures warned her that her criticism of repugnant business practices could put off corporations.²³⁷ Shortly after his appointment as successor to Potter LJ as President of the Family Division, in 2010 Wall LJ continued to speak out about government reforms and cuts to family legal services and organisation such as CAFCASS. When the Commons Public Accounts Committee launched an inquiry into CAFCASS, the committee at least, felt the President's attendance warranted.

As early as 2009 Wall LJ, had taken a key role in the discussion over the funding of CAFCASS. In 2009 he gave a speech entitled 'Justice for Children: Welfare or Farewell?', at the National Conference of the Association of Lawyers for Children Manchester, November 2009.²³⁸ Here Wall LJ expressed a great desire for himself and fellow judges to speak out on the cuts and be heard, calling for the 'historical and indeed instinctive judicial reluctance to go public' over such matters to 'come to an end'. Speaking three years before Neuberger's principles Wall LJ has been sure not to simply engage in a discussion about government policy, but has sought first to properly reason why he feels he must be outspoken. Furthermore, Wall LJ sets out what is later Neuberger's first principle: that judges should

²³⁷ *Mark Leftly: Margaret Hodge, feared basher of bosses, may be ready to step up to a bigger stage*, 7 February 2014, available at <http://www.independent.co.uk/news/business/comment/mark-leftly-margaret-hodge-feared-basher-of-bosses-may-be-ready-to-step-up-to-a-bigger-stage-9113483.html>

²³⁸ Wall LJ, *Justice For Children: Welfare Or Farewell?*, 21 November 2009 available at http://www.alc.org.uk/uploads/Keynote_2009.pdf

‘speak out in public on issues in relation to which they have knowledge and expertise’.²³⁹

Spanning forty years, as a family judge, President of the Family Division, and a career as a practising family barrister in the courts, Wall LJ can rightly be perceived to have some valuable observations to make.

Wall LJ also explicitly identifies, unlikely the very subtle hints we saw in some speeches in the last chapter such as Lord Hope, that he is at times speaking directly to government; even if they will not listen: ‘there have, as you know, been a number of governmental U-turns, and a patent inadequacy of what passes for consultation. Government appears to be driven by a powerful political agenda, which has no clear rationale, but which ignores the views of those who know most about the subject—that is, of course, the practitioners and the judges’.²⁴⁰

Wall LJ then not only expresses a desire to speak out and be heard, but also deals critical comments to the government proposals as well as engage closely with the subject of a committee inquiry; CAFCASS. It is surprising then to find that when the Commons Public Accounts Committee first wrote to Wall LJ seeking his attendance at the inquiry to give evidence he refused. In the opening comments to the eventual evidence session which is the subject of our sample we see Chair Margaret Hodge MP stating: ‘I welcome you both, Sir Nicholas and Sir Mark, and thank you very much for attending our hearing this morning. I know you felt some reluctance to do so’.²⁴¹ It was later revealed that in the face of Wall LJ’s initial reluctance, Margaret Hodge MP in fact wrote to him ‘repeatedly’ requesting his attendance.²⁴² We saw earlier that committees in practice are advised that is constitutionally

²³⁹ Wall LJ, *ibid*, at paragraph 14

²⁴⁰ *Ibid* at paragraph 51

²⁴¹ PAC (n201) Q96

²⁴² Politics of Judicial Independence (n162) Chapter 6

improper to compel a judge's attendance, so it is far more likely that negotiations took place between the Parliamentary clerks and Wall LJ as to the line of questioning that would be taken. It is also clear from the opening remarks that Wall LJ's reluctance to appear and discuss CAFCASS's value for money (the usual approach of Commons Public Account Committee sessions), Margaret Hodge MP stated that 'it would be helpful, in coming to some helpful conclusions, if we heard a little from you as the customer of CAFCASS' and not on the value of CAFCASS. After all the courts are 'customers' of CAFCASS, requiring their services, reports and participation in proceedings.

During the evidence session itself we see a marked change in the tone of Wall LJ compared with his speech of 2009. In answer to question 99 about whether he regarded CAFCASS as a world class service, Wall LJ in his response stated:

'I am very anxious not to get into a political debate about CAFCASS because, as you will appreciate, the Government funds and organises CAFCASS, and the judges have to make do with what they're given. I think both Mark and I would be unanimous, and all judges would be unanimous, in saying that what we want is children properly and independently represented in care proceedings. Any organisation that does not deliver that for whatever reason--and that is a matter for you--is not world class.'

Of course, given what we have read from Neuberger's principles and the JEB Guidance, there is a common reluctance by Judges to enter political debate. But speaking in 2009, Wall LJ called for the 'historical and indeed instinctive judicial reluctance to go public' over such matters to 'come to an end'. Wall LJ went on to state:

An inadequately funded CAFCASS, which is unable to work with parents and children outside the courtroom, is a bitter disappointment to those who believed that they were being promised change of the better when CAFCASS was brought into being.

Why the sudden change? Though the JEB Guidance was perhaps not explicitly in the back of his mind, it is likely that Wall LJ appreciated the fact that an extrajudicial speech grants far more scope and liberty than comments made in oral evidence before a Parliamentary committee. But also, it is possible that Wall LJ was reluctant to engage with politicians given the circumstances of his appointment as President of the Family Division.²⁴³

Furthermore, as President, Wall LJ also took to working closely with CAFCASS to help clear the backlog and continue working under the pressure created by the sizeable increase in care proceedings after the Baby P tragedy. So much so that on 30 September 2010, a joint agreement between CAFCASS and Wall LJ was issued to that end.²⁴⁴ During this time he was also refusing to attend the committee hearing. Reference to the agreement by an inquiry into the workings of CAFCASS was inevitable and that is evidenced by the committee members questioning of it.²⁴⁵

²⁴³ Then Lord Chancellor, Jack Straw, had exercised his veto to prevent the appointment of Wall LJ, instead preferring Hallett LJ. This was subsequently leaked to the press, and Jack Straw MP subsequently confirmed the appointment of Wall LJ as President of the Family Division. For further detail see, J Straw, *Aspects of Law Reform: An Insider's Perspective (The Hamlyn Lectures)*, (Cambridge: CUP 2013)

²⁴⁴ <http://www.cafcass.gov.uk/pdf/Joint%20Agreement%20October%202010.pdf>

²⁴⁵ PAC (n201) Q100

As a whole the session was later reported to have been a productive session²⁴⁶, and even featured some strange Parliamentary humour:²⁴⁷

Sir Nicholas Wall: If the Government want to avoid delay, they must make
resources available to ensure that delay does not occur.

Austin Mitchell MP: Amen to that.

Though the session touched on some policy elements as above, the main focus was on Wall LJ's experience of CAFCASS with the courts as a 'customer', and the educative and insightful evidence of Wall LJ was valuable and gratefully received. Wall LJ went on to set out for the committee how the role of the judge has changed over the years from arbiter to leading case management and the consequences of this for judges and the length and delays of legal proceedings.²⁴⁸

This example of proliferation of extrajudicial activity and comment from lectures to oral evidence, to committee reports is not isolated. Extrajudicial speeches often appear in lines of questioning either asking a judge about a speech that they themselves had recently given, or asking about a speech a fellow judge had recently given. A good example of this comes from Lady Hale. Lady Hale gave two speeches, one in October and the other in November of 2013, on human rights and the proposed government reforms to the judicial review process.²⁴⁹ Later, in June of 2014, the Lords Constitution Committee inquired into her

²⁴⁶ Politics of Judicial Independence (n162) Chapter 6

²⁴⁷ PAC (n201) Q125

²⁴⁸ Ibid, Q125

²⁴⁹ Lady Hale, at the Public Law Project Conference 2013, *Who Guards the Guardians?* 14 October 2013 <http://www.supremecourt.uk/docs/speech-131014.pdf> and Lady Hale at the Warwick Law Lecture 2013 *What's the point of human rights?* 28 November 2013 <http://www.supremecourt.uk/docs/speech-131128.pdf>

thoughts about these reforms during an oral session with her. Here comments were later picked up on in the press.²⁵⁰

What is clear here, is that as with extrajudicial lectures and speeches, evidence to committees is in substance less clearly defined; neither purely educative nor purely political. The dangers of overly political evidence compromising the independence of individuals and the judicial institutions go some way to explaining part of that. But also, as seen in the sessions of oral evidence to the Constitution Committee, this mode of extrajudicial comment is considered the only remaining mode to convey thoughts and ideas from the judiciary into the Parliamentary sphere.

Conclusion

The JEB Guidance asserts the importance of the principles of a separation of powers and judicial independence by delineating what should and should not form the basis of a committee inquiry or specific question. These aims are supported by long established conventions and Parliamentary rules. But at the opening of this section on evidence to committees we noted that the number of instances where judges were called to give evidence is increasing. We can reasonably conclude then, that far from discouraging communication between the judiciary and Parliament, the regulation attempted by the JEB and the constitutional principles relied upon have in fact set out clear parameters for both branches of government to consider and adhere to. This formality, and the set procedures and negotiations for arranging appearances, might over time help to change the rather negative

²⁵⁰ *Top judges raise concern over plan to restrict judicial review challenges*, The Guardian 25 June 2014.
<http://www.theguardian.com/law/2014/jun/25/judges-restrictions-judicial-review-challenges>

judicial attitudes to committee appearances. It might also better inform MPs as to the proper conduct of a hearing. These effects are positive and encourage the use of oral evidence sessions as a means of interaction between Parliament and the judiciary.

From the committee appearances studied above, there are also significant examples of those judges making critical observations of government policy proposals.²⁵¹ With the removal of a judicial representative in the Cabinet, making direct representations from the judiciary to the executive, Parliamentary committees are the only remaining public channel allowing for dialogue with (and the chance to air grievances to) Parliament. This direct approach could help to encourage Parliamentary debate about the matters raised during those committee sessions, and thereby provide valuable feedback to the executive. But we also see a common link between speechmaking and oral evidence sessions. In chapter two we saw how, when private judicial-political communications and negotiations fail, judges will make extrajudicial speeches on the matter and ‘go public’. We now see that following such speeches, judges may volunteer to explain the views expressed in those extrajudicial speeches. Of equal importance, a committee may want to probe the views expressed in those extrajudicial speeches with the relevant judge. Though our evidence sample is small in size, it is possible to speculate that post-2005 a new chain of public communicative processes exists between the judiciary and politicians, where private interactions are unsuccessful. Prior to the CRA, senior judges could address the upper chamber directly, or the Lord Chancellor could convey concerns to the Cabinet and Prime Minister. Without these platforms, judges have been able to adapt the remaining practices of judicial speech making, and committee appearances to ensure their views are heard by Parliament, and the government via MPs and peers alike.

²⁵¹ For some carefully selected examples see Leyland and Bamforth (n151) at page 211

CHAPTER FOUR: CRITERIA FOR ASSESSMENT, AND POSSIBLE REFORMS

So far we have mapped the impact of the CRA on the practice of extrajudicial comment. In chapter two we traced the evolution of extrajudicial lectures, pointing to a trend away from the predominantly educative lectures to more policy-orientated lectures, especially where private judicial-political communications on those policy issues had failed. In chapter three we reflected on the growing practice of judicial oral evidence before Parliamentary committees, noting the different attitudes and approaches adopted by different judges, but also the connection between speechmaking and oral evidence as a part of a larger process of communication. Underlying much of the discussion in chapters two and three have been fundamental doctrines such as the separation of powers and judicial independence. In particular, we noted that there is a common concern to regulate extrajudicial comment—in the sense, that is, of ensuring that comments remain within constitutionally acceptable bounds—that applies in the different contexts of extra-judicial lectures and evidence before Parliamentary committees. In chapters two and three we saw attempts through informal guidance—by Lord Neuberger *vis-à-vis* extrajudicial lectures and the JEB Guidance on oral evidence—to delineate extrajudicial comment. Driving much of the discussion in these chapters is the recognition that, judicial interactions with Parliament and the government have changed over the last ten years from direct judicial representation in the Lords and the Cabinet, to more indirect communication exemplified by evidence sessions in Parliamentary committee rooms, or even more remotely, judicial speechmaking.

This chapter is in two parts. Part A examines how to assess these means of extrajudicial communication that are becoming ‘more travelled’.²⁵² This focuses on their sufficiency as a means of communication between Parliament and the government with the judiciary, which will allow us to establish criteria by which to test existing methods of judicial-political communication as well as possible reforms. To do this, Part A draws together the main conclusions and comparisons of the analysis of both extrajudicial speeches and oral evidence. It defines what constitutes ‘successful’ communication and delineates the criteria for conducting such an assessment. It then summarises the key considerations to include in any attempt to regulate extrajudicial comment-making. Finally, Part A sets out the significance of the similarities underpinning both the JEB Guidance and the Neuberger principles. This will then set the foundations for Part B which, firstly, draws on the analysis of the regulations in order to inform a new uniform set of principles, designed to govern all forms of extrajudicial comment. Part B then examines the possible reforms currently being discussed between Parliament and judges, to improve judicial-political communications. Here the assessment criteria from Part A are key, and are used to investigate the merits of the proposals for reform set out in Part B. This chapter is important to the central research question of studying and assessing how judges comment extrajudicially since the reforms of the CRA 2005. A good method of communication will satisfy the above criteria which are informed by our earlier study of the two most popular present practices. Further, judges using a particular method to make extrajudicial comments, should have clear principles to consider and, ultimately, to guide them to ensure that their words are not constitutionally improper. This is more important given that speechmaking may sometimes serve as a trigger for a committee appearance, as a part of a larger debate. So it should follow that these

²⁵² Lord Neuberger, *Where Angels fear to tread* (n11) suggests that post CRA 2005 speechmaking and extrajudicial comment inevitably became ‘more travelled’, and popular. See page 4 of the speech

extrajudicial communications be regulated by uniform principles. The need to identify and reflect upon these overarching principles is important to compliment the criteria for assessing and ensuring effective means of extrajudicial communication.

Part A: Evolution in the Substance of Judicial Communications

In oral evidence before Parliamentary committees, we saw how judges readily agree to help MPs and peers to understand legal principles, legal procedures, judicial appointment practices, and judicial workloads. These have always been identified as judges appearing in an explanatory capacity to clarify things which the committee would otherwise not understand—not for judges to explain themselves or their decisions. But some judges have been more pro-active.²⁵³ So here the spectrum also appears, with educational appearances at one end and the, albeit rare, policy orientated appearance at the other.

This is sometimes a small step from the educative to comments on policy. Indeed the subtlety of the suggestions made in speeches like that of Lord Hope likely escape the notice of the students being addressed. Speeches to the other end of the spectrum are often picked up on by legal correspondents, but very rarely by the mainstream media.²⁵⁴ These are very different in purpose—on the one hand bemused students grappling with legal studies, and on the other pertinent issues affecting a dissatisfied profession. Scholarly lectures are not considered

²⁵³ For examples, see how Lady Hale and Sir Maurice Kay LJ differed in their approaches, attitudes and answers when asked the same questions as each other in chapter 3 above (n201) and The Select Committee on the Constitution Inquiry on The Office Of Lord Chancellor Evidence Session No. 3 Heard in Public Questions 30 – 42, showing the differing approaches of Lords Hope, Judge, and Woolf. In particular note the reticence of Lord Hope to speak on issues he feels to be more suitably asked of Woolf and Judge, available at <http://www.Parliament.uk/documents/lords-committees/constitution/lord-chancellor-inquiry/ucCC230714ev2.pdf>

²⁵⁴ See reports of Lord Phillip’s comments in the BBC about the funding of the Supreme Court, *Supreme Court Independence, threatened by funding*, BBC 9 February 2011, <http://www.bbc.co.uk/news/uk-12400913>

so newsworthy or entertaining for the masses. A judge's comment on policy, however carefully phrased, is much more likely to lead to discussion in the media. However, perhaps unsurprisingly, the approach of the media differs greatly to that of Parliamentary committees.²⁵⁵ We have seen from both the JEB and the sample of oral evidence discussed in the previous chapter that Parliament is sometimes keen to hear from judges on jurisprudence and procedure and their scholarly understanding of the law. But committees are also willing to broach policy matters, knowing that contentious questions may be opposed by the judge while negotiating the line of questioning with Parliamentary clerks in preparation for the session, or the judge may refuse to answer a given question during the session. A scholarly extrajudicial comment then may not be so 'popular' in the press or widely reported, but that is not to say that it has been ignored or not heard by Parliament. This is an important consideration when setting out our criteria for assessment of these modes of comment as means of communication.

Adapting and evolving the practice of giving extrajudicial lectures, demonstrates the unconventional way in which senior judges sometimes communicate with the other branches of government. In order to ensure an effective government, the three branches of state must communicate with each other, in order to hold each other to account and keep each other informed of their work.²⁵⁶ As argued in previous chapters, this has become more important, given the new responsibilities of the LCJ, SC President, and senior judges as administrators of their courts and divisions. Senior judges need to communicate with government figures over various issues, from funding to administration. We know that such communications occur routinely and in private. But public extrajudicial comments are also increasing, as a

²⁵⁵ HLCC, *Relations between the executive, the judiciary and Parliament* (n26), at para 125

²⁵⁶ See earlier in Chapter 3 above, on the academic discussion of how Committees hold judges to account

means of communication with the government.²⁵⁷ We have seen some of the issues discussed relate to government policies over cuts to legal aid, restrictions on applications for judicial review, and reform of child care services and family court procedures. All of these are issues where the government has already made up its mind, and is ready to legislate over the issues. By speaking out publicly, the judiciary could be viewed as trying to draw public attention to, or support for, their concerns as a means of last resort. From the analysis in chapters two and three this is likely to target the legal profession more than the public in general. The clearest example of public extrajudicial comment being used as a means of last resort, following unsuccessful private discussions with politicians, came from Lord Phillips over whether the Chief Executive should be answerable to the UKSC or the MoJ. On that occasion Ken Clarke (then Lord Chancellor) was forced to make a public statement the following day, playing down Lord Phillips' concerns, and trying to save face. But the publicity failed to change the MoJ's position. The wider debate over the issue continued until Lord Phillips returned to the Lords on retirement and moved the necessary amendments. So how do we assess the judges success in achieving that purpose? To do this, we must first establish some criteria to apply more closely to the modes of extrajudicial comment.

Criteria for Assessment of Extrajudicial Communication

Given the spectrum of extrajudicial communication, in both form (where they take place etc.) and substance, and the differences in topic of the oral evidence sessions, it is essential to draw on common features of these extrajudicial comments in order to assess how successful they are and then compare them.

²⁵⁷ Some 38 Judges have given evidence to Parliamentary Committees from 2006 to 2012, while over a shorter period of 2009 to 2013, (n151) the supreme court judges alone, gave 81 speeches, (n70)

An extrajudicial comment is successful if it achieves, or exceeds, its intended purpose in a positive way. Particular speeches will no doubt have different intended purposes to others. But drawing on a more generic basis, a few similarities become clear. When judges speak, they prefer their audience to heed their words and to pay attention. But more than that, as well as heed the judges words, the audience may be comforted—for example, to know that senior judicial figures share their outlook and opinions on government reforms. Or the audience may be inspired to continue the debate and discussion further, proliferating into a debate, and push for reform. But most significant, and rare of all, the audience may be moved to publish the extrajudicial comments in the mainstream press. Judges do not always deliberately aim for this to happen. Sometimes when a judge gives a lecture they are often invited to do so by their hosts, for the prestige of having a judge attend. Though of course that should not detract from the importance of their valuable experience and knowledge, it does allow for a more realistic view to be taken of how and why judges might speak on particular topics. The universities and inns that invite judges in this way, would perhaps understand a successful speech to be one which drew a strong turnout of students, academics, and perhaps practitioners. But we are assessing the speech as a means of communication with Parliament and the government, so one aspect we need to look at is how successfully public extrajudicial comments engage political figures.

So a successful speech in its most basic terms is one which engages the audience in some way and makes them listen. Simple perhaps; any good speech does this. But in oral evidence before Parliament there is little need for engaging or inspirational speech making. The sessions come in the form of a series of questions and answers. So how can we define a successful committee appearance? Also, unlike speeches, the turnout and attraction of attention is not always as popular as we earlier saw how Parliamentary clerks struggled to

make a committee quorate for the appearance of the LCJ himself! So what similarities exist between oral evidence and lectures that could be argued to make them successful.

A communication, and the method used to make it, can be said to succeed if it achieves, or exceeds, its intended purpose in a positive way. We can perhaps discern a plausible intention from the surrounding facts. An example of this can be seen with the speech by Potter LJ as head of the family division. The audience was a conference of family law barristers, solicitors, and care workers. The timing was crucial: not only did the Government plan further reforms and cuts to family law legal aid, but a parliamentary committee was leading an inquiry into the care service provider CAFCASS. From this background information we can expect that Potter LJ will use his position as the leadership entity of the family courts to express an opinion on the then recent government actions relating to family court funding. In particular we can expect Potter LJ to address or refer to the concerns of the practitioners gathered before him. This is then further evidenced when we look at the speech. In the first chapter we saw how Potter LJ set out a reasoned argument against the uncertainty of the proposals, and a staunch defence of family justice, whilst simultaneously acknowledging that some change would be needed to make the system sustainable. But the purpose? We might suggest that Potter LJ was coming forward to show leadership and support for the profession, and show that the senior judiciary share their concerns and will do what they can, within the scope available to them as independent judges. This sort of intended purpose is entirely specific to this particular speech by this judge, Potter LJ. In order to assess the success of a speech in terms of it achieving the purpose intended by the speech giver, in lieu of an interview, requires a detailed study of the maker, the form, and the substance of the comment, as done in chapter one. The shortcomings of this mean that the findings will essentially be assumptions, made on a plausible but subjective basis. This would make any

conclusion susceptible to failing to uncover any subtleties in the intention of the judge, which are not otherwise obvious from the speaker, form, or substance of the comment. Furthermore, whilst a judge's answer to a Parliamentary committee question is most often in their own words, judicial lectures are sometimes drafted, or contributed to, by judicial assistants.²⁵⁸ Of the speeches in the sample in chapter two, two give thanks to the judicial assistant for 'supporting research'.²⁵⁹ Therefore there is a possibility that the intended purpose of the comment is not solely envisaged by the judge, but may carry with it a secondary purpose held by the judicial assistant. The impact of this, and any possible skew, is difficult to discover without interviews. Despite this, the final comment or speech comes from the judge and is a comment of the judge, not the assistant, whether after editing, approving, and adopting any drafts from assistants or not.

Judges may also share speeches. Just how much of this goes on is unclear during my yearlong research. But we can see that judges sometimes refer to earlier speeches of their colleagues. Whether this is because they have privately passed a copy, or because the previous speech caused a stir it is not always easy to infer. But such private sharing could be for added effect, or a common and shared intended purpose. For example, Lord Neuberger in the *Holdsworth* speech²⁶⁰ cited, Lady Hale²⁶¹ making a speech describing the legal aid cuts as 'fundamentally misconceived' and a 'false economy'. In citing Lady Hale's words, Neuberger went on to defend Hale's right to say these things, and highlighted that it was the proper function of the judiciary to draw attention to policies that detrimentally affect the administration of justice.

²⁵⁸ Tetyana Nesterchuk, *The view from behind the bench: The role of judicial assistants in the supreme court*, in A Burrows, D Johnston QC, and R Zimmermann, *Judge and Jurist: Essays in Memory of Lord Rodger* (OUP 2013) at page 106

²⁵⁹ Lord Neuberger thanks his judicial assistant for the research into the history of the Kilmuir Rules; Lord Hope thanks his judicial assistant for research into vicarious liability.

²⁶⁰ Neuberger (n11) at 43

²⁶¹ B Hale, Law Centres Federation Annual Conference Opening Address, (2011) - (http://supremecourt.uk/docs/speech_111125.pdf) at page 5 and Neuberger (n11) at page 3.

Here, if the two judges shared their speeches or opinions, Lord Neuberger's decision to come to the defence of Lady Hale would indicate a much more collegiate UKSC when it comes to communicating to external bodies.

At the Royal Courts of Justice things are not as straightforward for conducting research compared to the UKSC. During my research it was problematic that the Judicial Communications Office (JCO) do not hold a complete database of the speeches given by serving judges. Of the speeches used in our sample, the speeches by the Supreme Court Justices can all be found on the Supreme Court website. However, on the judiciary website, Wall LJ's speech to the Association of Family Lawyers, was not recorded nor available on the MOJ website, whilst only a few others he gave were recorded there. I attempted to discover how the JCO determines which speeches make it onto the online record, and which do not. I have not yet received a response. I have also noticed that at some point between the end of May and start of June the MOJ website was 're-launched', and the JCO's database of speeches, entirely removed. I have again raised this with the JCO, and await a response. This stark contrast in record keeping, and public accountability, suggests a great deal about the greater autonomy and administrative authority of the justices of the Supreme Court, compared with that of the judges of the RCJ.²⁶² One possible reason for the difference could be that the Judicial Office is responsible for both the High Court and the Court of Appeal.²⁶³ That includes some one hundred and eight High Court judges²⁶⁴ and thirty eight Court of Appeal judges.²⁶⁵ Documenting the speeches of one hundred and forty six judges could be

²⁶² para 1.5 of HMCTS Service Framework document Cm. 7350 (2008), details the responsibilities of the civil servants working in the higher courts to the MoJ, whereas the Crime and Courts Act 2013 separates the Supreme Court entirely, with the Chief Exec of that court answerable to the justices; not the MOJ.

²⁶³ Royal Courts of Justice: <https://www.justice.gov.uk/courts/rcj-rolls-building/rcj>

²⁶⁴ The Maximum Number of Judges Order 2003 No. 775 Article 2, states that there may be no more than 108

²⁶⁵ Senior Courts Act 1981

more demanding than for the twelve SCJs, despite an official JCO dedicated to serve the RCJ. But, provided that a judge of the RCJ who gives a speech, makes a copy available to the JCO, then it should not be so difficult a task.

Asking if a comment achieves its intended purpose raises a need for more in depth analysis. How effectively was the method used to convey the message and achieve that purpose? How comfortable was the comment-maker in making the comment, hoping to achieve that outcome? These questions link the analysis of the methods of making extrajudicial comment: oral evidence and speech making; as well as the success of achieving the intended purpose. In summary then, the first, but also overarching criterion looks at the success of the intended purpose of making such comments.

1. Intended Purpose. The success of the intended purpose of making such comments would depend upon the intended consequence of the comments as envisaged by the judge. These intentions might be discerned from the substance or content of the speech—a political speech may have a hope to influence government policy, while an educational speech may be for academic note.

2. Efficiency. This analysis is dependent upon the classification exercise in chapter one—here we are analysing the efficiency of firstly, on form, how efficiently the extrajudicial comments are directed, taken on board or received as a result of the chosen method of communication. For example, with the speech by Lady Hale on legal aid cuts, how efficiently was Lady Hale able to direct her opinions and extrajudicial comments to the audience, and were those comments capable of being easily received by the audience? This question essentially examines the efficiency of the chosen method to convey the chosen message. This

investigation is done in isolation, without considering the alternative methods a judge may be exercising simultaneously. As Lady Hale gives her strongly worded speech, there is a possibility she may also be conveying her concerns by other means (possibly by private lobbying of the MoJ or Lord Chancellor). Secondly, on substance, this criterion investigates how efficiently the extrajudicial comments are at achieving that intended purpose. For example, how efficiently the chosen method of conveying the intended message was at influencing policy or educating the law schools. Here it may be necessary to compare Parliamentary evidence with lecturing, where the speakers are seeking to make the same point. The success may be evidenced by investigating results or outcomes, by way of proliferation of the extrajudicial comments into further debates whether Parliamentary or academic.

3. Constitutional Propriety. This criterion draws on the foundational principles of judicial independence and separation of powers. We have seen how some judges are reticent to comment, and will occasionally decline to answer certain questions from Parliamentary committees, because the judge feels it would be constitutionally improper to do so. But so too, we have seen that when speech making, judges will avoid giving an explicit denouncement of political policy, instead reporting on findings of consultations which themselves cast the policies in a negative light (for example in the speech by Lady Hale on cuts). These refusals, and indirect criticisms are a compromise between maintaining the independence and impartiality of the judiciary—should any of these matters ever come before them for judgment—and the separation of powers (keeping judges out of party politics and government policy). The need to maintain these principles can make a judge uncomfortable when being pressed for answers which might damage these principles. This question therefore requires an analysis of the form, substance and speakers attitude to the

method. The investigation into the form raises the question: are speeches more under the control of the speaker and thus more comfortable than a politically driven question posed by a Parliamentary committee? Looking into constitutional propriety draws on the substance of the comment and any risks that the comments made may raise concerns over judicial independence and the separation of powers. And looking into the attitude of the speaker indicates their base reticence and caution when it comes to constitutional propriety. Finally, the question about the speaker's attitude to the methods of making an extrajudicial comment is especially important. This is because, within some broadly drawn boundaries, the approach taken by judges to a specific method is subjective and specific to the attitudes, expectations, and conceptions held by the judge. We saw this most clearly with the Parliamentary session with Lady Hale and Kay LJ. Some judges are more open, and others reserved. But does being more open increase the possibility of concerns over judicial independence, or are these judges prepared, controlled, and careful in their choice of words? The overall purpose here is to see how easy it is for judges to make use of the methods available to them, and how comfortable are they doing so.

Bringing these criteria together, it may be seen that evidence to committees for example may be considered more efficient—evidence direct to Parliament—but also the least comfortable, since judges may be required to refuse to answer questions considered outside of their remit or that may compromise judicial independence. Whilst public speeches may be the most comfortable and easy, the efficiency of delivery lies with the make-up of the audience, news coverage, and the reach of the published words. The success may be assessed from the view of the judiciary on an individual and institutional level in terms of how worthwhile the institution and individual consider each method, and also the actual impact—did the decision to speak out have the desired effect, in fact, in the view of the individual judge, as compared

to the view of the institution. The judiciary as a whole, may find that oral evidence to Parliament is a more worthwhile means of communication than an extrajudicial speech. Individually, more senior judges like the LCJ and those in leadership roles that need to communicate regularly would agree. Parliamentary committees are made up of influential MPs or peers, or sometimes both. Engaging with them directly, and in a forum of mutual respect must be conducive to successful and worthwhile communications. We have seen in chapter two how sessions prove valuable whether on questions of jurisprudence, or policies affecting the legal system and administration of justice. We also saw, how the public nature of committee hearings also allows for issues identified by judges to be reported in the press. Though realistically, reports are rare unless the issue hints at friction or discord between the judiciary and government. However, puisne judges may find that speechmaking is more worthwhile, as they are free to speak on their own initiative, on matters they choose and not at a committee's behest. Yet we have seen that senior judges also regularly make speeches, sometimes using speeches to draw public attention to issues, in the same way that committee hearings do. But speechmaking does not ensure MPs and peers will be in the audience to listen, and it can perhaps be seen to be unhelpful for establishing good judicial-political relations, and engagement.

The three criteria that are critical in assessing the success of extrajudicial comment are: constitutional propriety, efficiency, and success vis-à-vis the intended purpose. We revisit these criteria later to see if the reforms proposed to improve or supplement the current situation, satisfy these criteria.

Regulating Extrajudicial Comment: Key Considerations

In the introduction we stated the need to focus on extrajudicial speeches and Parliamentary oral evidence, out of an array of types of extrajudicial comments. This was because out of the non-statutory measures these are the only two to attract high profile guidance and be the most frequent means of public comment by the senior judiciary and leadership figures. The concern is that by speaking more frequently, and with more judges speaking, judges risk compromising judicial independence both individually (by discussing matters they may later need to decide in court)—or institutionally (by damaging the reputation of the judiciary as an impartial and independent body). That is why guidance is needed to regulate the practice, and ensure extrajudicial comments do not fall outside constitutionally acceptable parameters. Here we look at what the guidance from Neuberger and the JEB state, and try to draw out the principles that are most pertinent for extrajudicial comment-making. These include: ensuring judges do not become a source of negative entertainment; guiding judges to prevent constitutionally improper comments; allowing judges to comment freely, but with caution, over issues affecting the proper administration of justice; and the issue of extrajudicial comment becoming too commonplace. We can then effectively summarise the meritorious concerns and considerations judges should have when commenting extrajudicially, and identify how those concerns relate directly to the constitutional propriety of a method of communication. This then informs an investigation into what regulations are necessary to ensure continued judicial independence but still allow for extrajudicial comment; whether the seven principles suggested by Lord Neuberger and the JEB Guidance can work together; or are a pre-cursor for more stringent control, or a more formalised mechanism to make constitutionally acceptable representations to Parliament.

Before the Kilmuir Rules, there was in effect no regulation as to what judges could and could not say, extrajudicially. Judges have long been aware that outside of the court room, they must not behave in a way which undermines their role as judges. Indeed when the Kilmuir Rules came into being, this was not as a reaction to judges being outspoken. It was out of concern that with the dawn of a media age, organisations like the BBC might seek to use judges for ‘entertainment’ purposes.

In setting the rules aside, Lord Mackay argued judicial independence was much an individual concept as an institutional one. He therefore granted judges a discretion to choose whether or not to speak extra judicially. This discretion continues to this day, but if a judge does choose to speak, then what consideration should they bear in mind when commenting?

In setting out a series of suggested principles Lord Neuberger stated that he thought speeches were becoming more and more frequent. He did not however state that judges were being too outspoken, or speaking on issues upon which it was improper for them to do so. The examples he gave which raised concerns about judicial independence on matters such as the fox hunting bill, were from very senior judges speaking extrajudicially as members of the Lords. Even here, Neuberger suggested that such comments had been concerning, but still constitutionally acceptable. The only example outside of this was from Scrutton LJ speaking on integration of the ECHR into English law. So does that one example from over two decades ago really warrant any new guidance?

Reading the guidance from Lord Neuberger and the JEB, there is still nothing that might appear new to judges. Many of the principles are long established conventions of the expected standards of conduct and behaviour of serving judges. Nor is there any evidence

of judges stepping outside of this. In chapter one we saw that from our sample of speeches, Lady Hale was by far the most political in substance. But even so, our analysis in that chapter, with the Neuberger principles, did not show any impropriety. Lord Neuberger himself spoke out in his Holdsworth club speech, citing the speech by Lady Hale, stating that Lady Hale had done nothing wrong. Lady Hale had attacked the legal aid cuts as ‘fundamentally misconceived’ and a ‘false economy’.²⁶⁶ In his speech, Lord Neuberger acknowledged that these comments entered the ‘territory of government policy, and indeed a particularly controversial aspect of policy’.²⁶⁷ But he went on to note that judges could ‘properly comment publicly on matters which go to the heart of the functioning of the judicial branch of the state’. Most importantly for our purposes he concluded:

‘In some circumstances, it could be said to be their duty to do so. In the past, it would have been easier for them to do so while donning their legislative hats in the House of Lords, or via the Lord Chancellor. But those days are now gone. Public comment in respect of the proper administration of justice, an accepted exception to the Kilmuir Rules, is more important now than it was when those rules were in place.’

In setting out his principles to guide judges in speechmaking, it is clear then that Lord Neuberger was not intending to prevent comments of the kind made by Lady Hale. That is to say, comments in respect of the proper administration of justice. This will be an important consideration to accommodate in creating a new uniform set of regulations.

²⁶⁶ Lady Hale (n75) Pages 3 and 5

²⁶⁷ Lord Neuberger (n11) para 43

Perhaps the only new concern, to have arisen over recent years, is the final point by Lord Neuberger that too many speeches may ‘devalue the currency’. But again, we have seen that the rise in the number of speeches could very likely be linked to the increasing demand for academic institutions, NGOs, and professional bodies to have a prestigious speaker to open, or speak at an event they are organising. Whilst this in and of itself should not detract from the importance of the judges words, it could ‘devalue’ the practise of extrajudicial speech making by recasting it as a sales and marketing exercise, or publicity drive.

Greater concern clearly exists when judges appear before Parliamentary select committees. We noted in chapter three that judicial attitudes towards committee appearances were outwardly positive about the value of meeting with Parliament in this way, but always followed by caution that it was becoming too frequent. The reasoning adopted we saw ranged from concerns over judicial impendence, the public perception of judicial impartiality, and the large-scale time commitment and preparation required to be undertaken by judges. The different approaches by different judges are a sign that some judges perceived workings of Parliament could be outdated.

We also noted that the JEB Guidance suggested that judges appearing before committees was a new thing since the CRA 2005. This is however not the case. On the 26 March 2001, for the first time, the Lord Chief Justice, Lord Woolf, the Master of the Rolls Lord Philips, and a senior Law Lord, Lord Bingham, together appeared before the JCHR.²⁶⁸ The inquiry was into the effect of the Human Rights Act on the higher courts and senior judiciary. The then chairman of the committee, Jean Corston MP (now Baroness Corston), commented:

²⁶⁸ JCHR, *inquiry was into the effect of the Human Rights Act on the higher courts and senior judiciary*, Session 2000-01 available at <http://www.publications.Parliament.uk/pa/jt200001/jtselect/jtrights/66/1032601.htm>

We are well aware that there are certain matters upon which you would not feel it proper to comment, notably, but not exclusively, individual cases. I can assure you that we have no wish to place you in an awkward or invidious position and if...some of our questions appear to you to nudge you up against the constitutional boundaries between the roles of the legislature and the judiciary, I am sure you will not hesitate to let us know.

This adds support to the argument made earlier that judges (and Parliament) are well aware of these core constitutional principles and the importance they have when considering their comments and conduct. With concerns raised as to the separation of powers and the importance of judicial independence, even before the CRA was drafted, it is not surprising that the current guidance draws on long established Parliamentary conventions such as the sub judice rule to help formulate the guidance for current judges.

Similarities Between the JEB Guidance, and the Neuberger Principles

Now that we know the salient features that should be included in guidance to judges for extrajudicial comment-making, we can begin to create a new set of principles. To help with this, we noted in chapter two that there were clear similarities in the guidance for judges on speaking extrajudicially. Be it lecturing and the informal guidance of Neuberger, or oral evidence and the guidance from the JEB, there are common considerations to be had in speaking extrajudicially. The opportunity that arises here is to fashion a constitutional role for judges speaking extrajudicially that is appropriate in a modern democracy.

We can bring the items of JEB Guidance, and Neuberger principles together, to demonstrate just how similar they are and create a uniform set of principles:

JEB Guidance	Neuberger Principles
<p>Item 1. The merits of individual cases, whether or not the judge giving evidence has adjudicated on that case, and whether these are pending, ongoing, or have concluded (but by exception in paragraph 7, this does not include discussion of cases in a jurisprudential context);</p>	<p>Principle 1: it seems to me only proper that judges, with their wisdom and experience, should be free to comment extra-judicially on a wide range of issues. In doing so they play an educative role.</p> <p>Principle 5 Fifthly, judges should think carefully of their audience, and the impact their comments might have upon it ... Might that impact, or potential impact, call into question their independence, their ability to carry out their fundamental role of doing justice according to law?</p>
<p>Item II. The personalities or merits of serving judges, politicians, or other public figures, or more generally on the quality of appointments;</p>	<p>Principle 3: a judge should consider the effect on the judiciary generally of any view expressed. The judiciary's claim to institutional independence depends in part on its institutional reputation and standing. It may be inevitable that judges may disagree on a policy or constitutional issue when sitting in court, and it may occasionally be inevitable out of court (e.g. when appearing before a Parliamentary committee).</p>
<p>Item III. The merits, meaning or likely effect of provisions in any Bill or other prospective legislation and the merits of government policy (but see paragraphs 12 -13 – providing an exception for comments which are educative and for policies which affect the administration of justice);</p>	<p>Principle 2: any comment should be made following careful consideration of the impact which it might have on both aspects of judicial independence.</p> <p>Principle 4: [could it be] that the statement trespasses into forbidden territory, and, if so, can it be justified on the basis that it falls within the appropriate ambit of judicial speaking out? And, if it can, is it expressed in terms suitable for a judge entering the arena in a non-judicial capacity?</p>

<p>Item IV. Issues which are subject to government consultation on which the judiciary intend to make a formal, institutional response, but have not yet done so (but see paragraphs 16-17).</p>	<p>Principle 2: as above, any comment should be made following careful consideration of the impact which it might have on both aspects of judicial independence.</p>
	<p>Principle 6: judges should not seek publicity for its own sake, or use their ‘office as a springboard for causes (however worthy).</p>
	<p>Principle 7: there are rather a lot of judicial speeches being made at the moment. I wonder whether we are not devaluing the coinage, or letting the judicial mask slip. In the light of the fact that I may be characterised as a serial offender, perhaps the less I say about that point, the better.</p>

Item I (and its exception) is an acknowledgement by the JEB that judges may on occasion speak on matters of legal theory, or the history, development and academic treatment of an area of law, or the matters of legal procedure, or professional matters such as the working life of a legal practitioner or judge. This specific exception is indirectly approved of by Neuberger’s first principle that a judges educative role is invaluable, and the fifth principle that a judge refrain from commenting on live cases or matters which they may later need to decide in court.

Item II, which requires judges to avoid personal attacks on fellow judges or other figures, is again supported, this time in Neuberger’s third principle, to be cautious in criticism, and where absolutely necessary, to behave in a ‘seemly’ manner.

Item III, preventing judges from commenting on the merits of prospective legislation or government policy, is very similar to Neuberger's concerns that judges have regard for the separation of powers and should not comment on policy. This also echoes some of the fifth principles as judges should refrain from commenting on policy which may later be the subject of judicial review and litigation. But again, the JEB and Neuberger agree on two exceptions—firstly where the comments are educative and secondly where the comments are on policies which affect the procedure or administration of justice.²⁶⁹

Finally Item IV, requires judges avoid giving personal views where the government is consulting and the judiciary intends to respond as a collective. This item is more reminiscent of Lord Kilmuir's requirement that nothing be said that is inconsistent with the position of the Lord Chancellor, but has similarities with Lord Neuberger's point that that personal views differ from judge to judge.

This then leaves two additional principles, set out by Lord Neuberger but not included in the JEB Guidance. These are principle six (not to seek publicity for publicity's sake) and principle seven (the concern over devaluing the practice by making too many speeches). Principle six is perhaps not so much a concern in oral evidence sessions, as the structure of the sessions centres on a line of inquiry which wouldn't allow for a judge to deviate and refer to charitable causes or the things envisaged by Lord Neuberger. The seventh principle however, is perhaps more important in oral evidence sessions. Too many judicial appearances would not only devalue the practice, making appearances regular routines rather than notable and important opportunities, but would also affect judicial independence. Regular meetings

²⁶⁹ Para 12 of the JEB Guidance (n130) and page 12 para 44 of Neuberger, *Where Angels Fear to Tread* (n11) "Public comment in respect of the proper administration of justice, an accepted exception to the Kilmuir Rules, is more important now that it was when those rules were in place"

of MPs and peers with judges, especially in so public a way, might suggest that the judiciary and politicians are not only communicating, but are close and ‘comfortable’. Whilst good relations are central to effective communication, judges must be independent and impartial, free from any interference, whether by appearance or in fact. This is especially important given the likelihood, however small, that cases involving politicians, whether judicial review, or otherwise, may come before judges in the courts.

Part B: Reform: Overarching Principles of Guidance

Part B sets out the significance of the underpinning similarities between the guidance from Lord Neuberger and the JEB. These two pieces of guidance deal with extrajudicial comment in isolation as lectures, and separately as oral evidence to Parliament. Together the similarities between the two can be used to inform an overarching set of regulatory principles for extrajudicial comment as an overall practice.

We have drawn together the common themes in the guidance to judges on oral evidence, and Neuberger’s seven principles. But we can go further by reformulating them. In Justice Wide Open, McNamara²⁷⁰ reorganised Neuberger’s seven principles following the common threads that appear in them. These common themes were twofold: ‘The first is freedom. It is concerned with scope and limits of when a judge should be able to speak. The second is caution. It is concerned with whether a judge who is legitimately able to speak should choose to do so.’

²⁷⁰ L McNamara, *Judicial Perspectives on Open Justice and Security*, in Justice Wide Open from Page 101, (<http://www.scribd.com/doc/97591792/Justice-Wide-Open-Lawrence-McNamara-Judicial-Perspectives-on-Open-Justice-and-Security>)

On this basis, McNamara identified that the proper process of approaching an extrajudicial comment is to determine first, the ambit of what you are able to speak about (for example in light of policy and the separation of powers, matters which may later become justiciable), and secondly, whether or not you should then speak (given the audience, the wider reception, the views of the judiciary as an institution and individuals, the possibility you may later need to rule upon the matter in court).

This is a much more appropriate way to issue guidance judges; these are the things you may speak about, this is what you should consider beforehand, in deciding whether or not to speak about them. This format appears more in the JEB Guidance, where the stages of the process are outlined.

McNamara also reformulates the Neuberger's principles along these lines, this is respectfully reproduced below, to include the JEB Guidance as well in order to create overarching guidance to judges on extrajudicial comment.

Overarching Guidance:

1. Judicial freedom: Judges must not, no matter how worthy the cause may be, use their office as a spring board to solicit publicity for, or lend authority to, causes (Neuberger Principle 6). However judges may speak on a wide variety of issues which include legal theory, jurisprudence, 'areas such as constitutional principles, the role and independence of the judiciary, the functioning of the legal system, and access to justice, and even important issues of law', particularly when speaking in an educative or explanatory role (Neuberger Principle 1 and JEB Guidance Para 3 Item I and para 7).

2. Judicial caution: Where the judge feels that they are free to comment, they must consider any potential effects any extrajudicial comment may have on:

(a) the separation of powers. The judge should pay careful consideration to the importance of judicial independence from both the legislature and the executive. (Neuberger principles 2 and 4) This is especially important where the proposed comment will address 'politically controversial issues, or matters of public policy'. The judge should consider the potential effects in light of both the substance of the proposed comment and the terms in which it will be made. A judge should not trespass on the territory of the other branches of the state, and reticence may be preferable on issues which may appear to tread too closely with these 'borders'. (Neuberger principle 4 and JEB Guidance para 3 Item III.)

(b) the individual judicial independence of the judge. Very importantly, a judge must consider whether the specific issue may later arise for determination in court. If it may then the judge should make it very clear that 'the judicial mind is not closed.' A judge should also consider the audience and the impact a comment may have. In particular, she or he should consider whether, if disseminated widely (including via the media), it might call into question 'their ability to carry out their fundamental role of doing justice according to law.' (Neuberger principles 2 and 5 and JEB Guidance Para 3 Item I.)

(c) the institutional independence of the judiciary generally. A judge should take account of the reputation and standing of the judiciary in all the circumstances at the time. Those circumstances include considering the frequency, nature and content of comments he or she has made previously, and which other judges have made. A judge should also include consideration of the most appropriate way to express differences

of opinion with other judges. A judge should note particularly that the Constitutional Reform Act 2005 makes the Lord Chief Justice the head of the judiciary in England and Wales, and only in exceptional circumstances would it be appropriate to comment if the view was ‘on a policy or constitutional issue which is inconsistent with the LCJ’s position.’ (Neuberger principles 3 and 7 and JEB Guidance Para 3 Item II and IV.)

The approach taken by McNamara is much more academic in the sense that it draws on the core constitutional principles that explain and reason the seven Neuberger principles, to provide a structure for the guidance. Given that the main core principles are the separation of powers and judicial independence, this allows McNamara to streamline the principles into just two limbs. By then drawing on the common features between the JEB Guidance and Neuberger principles, McNamara’s approach helps us to create a set of guiding principles focused on the constitutional theories that shape them. Rather than a seven box check list, we are left with two questions that should guide and ‘regulate’ the practice of extrajudicial comment. Firstly, is the judge free to comment on the matter put? And secondly, if the judge is free to comment, then should the judge in fact comment? In answering these questions judges already consider the matters above. But in restating them in the JEB Guidance and Neuberger principles, it is perhaps hoped to reach a uniform approach. Given the different judicial personalities however, uniformity of approach will always be a matter of degree.

New Mechanisms for Judicial-Political Communication

This guidance helps to keep judges from creating tensions with the political branches. In chapter one, we looked at the proliferation of Lady Hale’s speech on legal aid cuts. And

despite profoundly disagreeing with the assessment of Carl Gardner in his follow up article²⁷¹, he was right in his observation that ‘if judges take publicly political stands, calls will increase for them to be subject to a public confirmation process such as happens in America.’ This was not the case with Lady Hale, and the guidance above serves to avoid such a situation, and the ensuing inevitable politicisation of the judiciary.

But perhaps more can be done with this guidance. The JEB Guidance for example already exists, and judges already appear before committees. But we have seen that the attitude of some judges is outdated. Perhaps to help change this, there would be merit in creating a joint committee of both house for the judiciary.

We have already seen that on occasion a minister or MPs may be in attendance at speeches; for example in the audience of think tanks, or as members of the inns, but that their attendance is not always guaranteed. Perhaps an annual address from the Lord Chief Justice and the Presidents of Divisions, whether public or private.

As well as the guidance for speeches and oral evidence, Lord Neuberger has hinted that more radical reforms may be instituted to remedy the loss of being able to speak in the House of Lords. Indeed Lord Judge CJ had made the point that he felt he would be better off being able to speak in the chamber of the Lords.²⁷² The situation post 2005 has left the judges without a direct means of communication and involvement with Parliamentary debate or the Cabinet, and thus extrajudicial comment has become more frequent, and starting to formalise. But what reforms could address this issue?

²⁷¹ C Gardner, *Lady Hale’s injudicious speech*, Blog Head Of Legal, entry December 2, 2011 available at <http://www.headoflegal.com/2011/12/02/lady-hales-injudicious-speech/>

²⁷² Lord Judge, HLCC (n199) Q2

In 2007 the Lords Select Committee on the Constitution reported on the relations between the three branches of government.²⁷³ The committee looked at the relations between the judiciary and the other two branches of government in turn, as well as the judiciary's engagement with the public and media. In the investigation into the relationship between Parliament and the judiciary the committee looked at the various means of communication open to the LCJ. The summary of the report begins with the most obvious: section 5 of the CRA.²⁷⁴ The committee then looked at Parliamentary appearances, and the merits of a dedicated Parliamentary committee for the judiciary. Finally the idea of allowing the LCJ to speak on the floor of the house is considered.

The reasons for choosing to look at these possible reforms centre on their reception and consideration by Parliament and academics.²⁷⁵ These reforms have been investigated by the Constitution Committee, though they were all dismissed for the time being. These proposals have again been revived for consideration by the Constitution Committee. In July 2014, Lords Hope, Judge and Woolf were asked about the office of the Lord Chancellor, and the effects of the CRA 2005 upon representation of the judiciary in Parliament and the Cabinet. Whether because they are the most obvious, or popular, or easy reforms, we will soon discover, but they seem to be the focus of current discussion.²⁷⁶ In assessing these reforms for their plausibility as a means of communication, we can use the three criteria set out above: efficiency, constitutional propriety and success. These criteria are informed by our study of the current popular practices of speeches and oral evidence, and by using these criteria we

²⁷³HLCC, Relations between the executive, judiciary and Parliament, 6th report (n26)

²⁷⁴ Ibid, at page 38

²⁷⁵ For a brief overview, see Shetreet and Turenne, *Judges on Trial: The Independence and Accountability of the English Judiciary* (CUP 2013) at page 376

²⁷⁶ The proposals formed the basis of the HLCC report, Relations between the executive, judiciary and Parliament, 6th report (n26) and the HLCC evidence sessions with Lord Judge in his final evidence session as LCJ in 2013, (n199) and later with Lords Hope, Woolf, and Judge in 2014 after they had all retired, (n253)

are able to see if these reforms meet the same standard as we presently have, or provide better avenues of communication.

Parliamentary Committee for the Judiciary

The use of committees, the favourable attitude to them by some judges, the comprehensive guidance and important Parliamentary rules governing them, and the direct interaction with members of Parliament could also be adapted in another way. The constitution committee elucidated the argument behind establishing good channels of communication by stating: ‘Good communications are indeed both desirable and necessary, because there must be a mechanism for effective Parliamentary oversight of, and two-way dialogue with, the judiciary now that there is essentially no judicial representation in the legislature.’²⁷⁷

When the idea was put to the LCJ, the answer was far short of a resounding endorsement. That the idea ‘merits consideration’ is true. Parliament and the Courts would be seen to communicate via judges appearing before a joint committee of both houses, on matters relating to the judiciary and administration of justice.²⁷⁸ It would be a clear reference point for judges, as well as the Committee on the Constitution and Commons Committee for Justice. However, the sixth report of the Lords concluded that no such committee was necessary. The Constitution committee and Justice Committee were already engaged with the judiciary and had organised annual appearances with leading figures. Though the reasons of the LCJ and the committee are not detailed, we can see that this proposal does not do

²⁷⁷ HLCC *Relations between the executive, the judiciary and Parliament* (n26) Para 126

²⁷⁸ For a brief overview of this and the concerns for judicial independence see also Turenne, *Judicial independence in England and Wales*, in A Seibert-Fohr, *Judicial Independence in Transition* (Springer 2012)

well when subjected to our criteria for assessment, and in fact falls shorter than the assessment of oral evidence to Parliamentary committees more generally.

In terms of efficiency, oral evidence is currently sought or volunteered by the committee concerned with that topic of business (constitutional matters, to the Constitution Committee; financing and value for money, to the Public Accounts Committee; immigration and policing, to the Home Affairs Select Committee). Whilst some business may overlap, and some reports reference the work of other committees, Parliamentary business operates along clear lines, normally allowing for members of Parliament and committees to build up experience of their respective areas.²⁷⁹ To break, or supplement this practice, with one dedicated committee would unravel these benefits and lead to a committee receiving evidence on a broad variety of issues from the process of judicial appointments, to the importance of child services in the family courts. This evidence would need to be sorted and passed to the relevant committee, which may or may not have had all of its questions answered. Making the process unnecessarily longer and inefficient would also damage how successful committee appearances are at communicating a judge's comments to Parliament and vice-versa.

As for constitutional propriety, we can again see that a dedicated committee would be less suitable than the present practice. Whilst providing for a lawfully constituted committee for the judiciary, the creation of the committee would actually damage judicial independence by making it appear as though the judiciary and Parliament were overly intimate and in regular contact. These concerns do not arise with the likely infrequency of the s.5 reform proposed above. Nor do they arise with the present system of committee appearance, where hearings

²⁷⁹ Members of Parliamentary committees also often have experience of being employed in matters relating to their specific committees subject of business

are in public, but more importantly, they are not more frequent than on an annual basis, and are before different committees of MPs. It is inevitable that a committee for the judiciary would be unable to fill its time, and would probably only convene a few times a year, and meet especially for the annual evidence sessions of senior judges—another inefficiency.

Laying Written Representations Before Parliament Under S.5 of the CRA.

The first of these to be discussed here is s.5 of the CRA. Laying written representations before Parliament has already been referred to earlier in this paper. S.5 allows the LCJ, the LCJ for Northern Ireland and the Lord President of Scotland to ‘lay before Parliament written representations on matters that appear to be matters of importance relating to the judiciary, or otherwise to the administration of justice’. Despite this, since Lord Phillips as LCJ, s.5 has been used to lay reports before Parliament by those CJs that choose to produce them (though not always with agreement between judges and the Parliamentary clerks).²⁸⁰ It was described as a nuclear option by Lords Falconer and Judge, only to be used as a last resort—despite its frequent use to facilitate the laying of court administrative reports before Parliament.²⁸¹

The Constitution Committee considered how Parliament should respond if written representations were made to them by the LCJ.²⁸² The conclusion was that the House convene the relevant select committee and hold progress of any legislation to which the

²⁸⁰ G Gee, *The Lord Chief Justice and Section 5 of the Constitutional Reform Act*, (n52)

²⁸¹ HLCC, *Relations between the executive, judiciary and Parliament*, 6th report (n26) Paras 66, 114, 115

²⁸² Ibid Page 38

document might refer. The select committee would then invite the LCJ to appear before it to consider the written representations made.

The use of Parliamentary committees as a platform for interaction has come to the fore again. Of course a written response from the government to the LCJs representations would be expected. But ultimately, it seems the effect of s.5 would be to trigger a select committee appearance by the LCJ. S.5 therefore cannot be considered an alternative to the existing channels of communication, but merely a more formal means of causing a Parliamentary committee appearance. Though judges may volunteer themselves to give evidence to a committee on an inquiry, the senior judiciary have no formal power to set the agenda, or request an inquiry into a particular area. Using s.5 to initiate this process, leading to a committee, and Parliamentary discussion of the LCJs comments provides that. It also goes far beyond speech-making and oral evidence, in satisfying our criteria for constitutional propriety, since s.5 provides a statutory trigger for the communication; albeit the process itself is not provided for in the statute, but a convention suggested by the Constitution Committee. Furthermore, in ensuring the constitutional propriety of the subsequent committee hearing and Parliamentary discussion, we already have the JEB Guidance and Parliamentary rules which we discussed in chapter three on oral evidence sessions. These rules already guide both judges, and members of Parliament on what is and what is not constitutionally acceptable.

As to the efficiency of this method, we again overlap greatly with the earlier study of oral evidence, since the committee appearances are very much the result of activating s.5 in this reform. Judges of all positions in the judicial hierarchy and courts volunteer or are being invited to give evidence to different Parliamentary committees. Though the individual judges

may have different attitudes to the appearance—some being more restrained and cautious than others. There is a plausible suggestion that the increased frequency of appearances indicates a greater preference for, or acknowledgment of the effectiveness of, committee appearances. With this increasingly positive attitude, it may be regarded as cumbersome to make the process longer and possibly cumbersome, by first requiring the LCJ to lay written representations before Parliament. But that is not always going to be necessary. Agreed, it is hard to see why a puisne judge would need to initiate a committee appearance or inquiry. But for those with new administrative responsibility such as the LCJ, providing a constitutionally grounded method for initiating a Parliamentary discussion does seem necessary. There is also discussion of s.5 being amended to include the president of the Supreme Court, and if necessary the heads of divisions in the High Court.²⁸³ Some of these senior judges, with these new administrative responsibilities already benefit from annual appearances, where suggestions might be made for inquiries in the coming year. But should new matters arise during that year, or an inquiry be felt absolutely necessary, then senior judges would have the power to ensure they are heard. Though this gives judges the power to influence the Parliamentary timetable to some small degree, it still preserves the principles of a separation of powers and judicial independence since the process is public, formal, and merely a mechanism for initiating a committee appearance and Parliamentary debate. The business of committees and Parliamentary debate are already subject to guidance and rules to ensure constitutional propriety.

This then leaves the question of success of the intended purpose. Arguably s.5 being used in this way, again far exceeds the ordinary method of speech-making and oral evidence. This is

²⁸³ HLCC, In oral evidence from Woolf, Judge, and Hope, July 2014 (n253) at Q36, page 13

because s.5 would require as a matter of course that Parliament hear the senior judge, and discuss the comments of the judge in the chamber. Currently an extrajudicial speech is rarely mentioned in the mainstream press, or perhaps included as a committee question to ‘break the ice’ early on in a session. Similarly evidence to a committee may be included in the committee’s final report, but there is no assurance that Parliament will discuss it, or that the government will take note of it. It is highly unlikely that s.5 would be used to discuss jurisprudential matters, but far more likely that s.5 would be used in this way where senior judges were very concerned over government proposals, or actions which (as required in the JEB Guidance) would impact upon the function, or business of the judiciary or justice system, or the administration of justice.

There is also a concern that using s.5 in this way would revive the comments that s.5 is to be used as a means of last resort—a nuclear option. At the very worst, judges calling for Parliamentary business to be set to judicial agenda on a frequent basis would lead to an outcry. But given the reticence at present with using s.5 to lay written representations (not including reports, but on pertinent and sensitive matters such as cuts or law reform), it is likely that this proposed reform would not be over-used. But that is not to say it is not a necessary mechanism, to be savoured until needed. It provides the easiest way to allow the senior judiciary to force a discussion over judicial opinion or concerns, where other means fail. Other means, might include consultations for example. But ordinary members of the public might submit a response to a government consultation. The judiciary is a branch of the government, and it is essential for the branches to communicate in order to ensure effective government. This special status of the judiciary should then allow for a constitutionally proper means of ensuring that the other branches of government properly consider the impact, concerns, or opinions of the judiciary, on Parliamentary or government

business which may adversely affect the judiciary, or the administration of justice for which the judiciary are responsible.

To conclude, expanding s.5 to enable the SC President, and perhaps the heads of divisions, to lay written representations before Parliament, would give the benefit of normalising s.5 so it is no longer a nuclear option for the LCJ. Further, amending s.5 so as to adopt the process suggested above would also create a mechanism which is more efficient, constitutionally proper, and successful as a means of judicial-political dialogue, than speechmaking and oral evidence alone.

Should the LCJ Have a Right to Speak on the Floor of the House?

In chapters one and two, we saw how sometimes an extrajudicial comment may be picked up on by Parliamentary clerks and be referenced in papers to brief Parliamentarians for forthcoming debates. That is as far as the proliferation of extrajudicial comments go, into the chamber. There is no clear evidence for example, that Lord Thomas LCJ, or any previous LCJ, had their concerns over legal aid cuts heard, repeated, or cited in the chamber of either house. It is strange to so easily shut out the concerns of the person who is responsible for the judiciary. A judiciary which has noted how legal aid cuts will affect their working, from the delays due increased litigants in person, to the worrying concern that access to justice be limited to the wealthy.

How then can we ensure that the LCJs thoughts and concerns and those of the judiciary are heard and considered in the house, satisfying in part the criteria for success? Rather than give oral evidence to committees, and see the LCJs words reproduced in summary in a final

report, which may or may not be read by MPs, but more likely summarised even further by their clerks; wouldn't it be reasonable to allow the LCJ to return to the Lords?

The sixth report of the Lords Committee already noted that prior to the CRA 2005, Law lords normally adhered to strict conventions, which limited their contributions to the legislative activity of Parliament. The senior judges including the Lord Chief Justice were cross benchers, in the Lords, and would on occasion address the House from the cross benches. One example would be of Lord Woolf, Lord Chief Justice from 2000 to 2005. Lord Woolf addressed the house once in 2000,²⁸⁴ once in 2002,²⁸⁵ twice in 2003,²⁸⁶ and seven times in 2004.²⁸⁷ Were the LCJ to return to the Lords, there would be no reason for the judge to contribute to debates on the creation of, for example, the debate over free schools and academies. Instead the LCJ would be expected, and respected, where debates concern legislation that would affect the administration of justice, the operation of the courts, access to justice, and the proper working of the legal professions. There are many reasons why we can expect this convention to be observed. The new role of the LCJ as head of the judiciary already means that the office of the LCJ is busier than ever. Increasing media and public engagement, the preparation of annual reports, the implementation of new duties and responsibilities regarding the running of the courts, and procedures, and the oversight of divisional heads exercising delegated powers. It would be difficult practically for the LCJ to spend lengthy periods of time in the house and speaking on matters on a regular basis.

²⁸⁴ Criminal Justice and Court Services Bill, HL Deb, 4 October 2000, c1608

²⁸⁵ Courts Bill, HL Deb, 9 December 2002, c25

²⁸⁶ Judiciary, Legislature and Executive, HL Deb, 21 May 2003, c876; Criminal Justice Bill, HL Deb, 16 June 2003, c572

²⁸⁷ Constitutional Reform, HL Deb, 26 January 2004, c22; Supreme Court and Judicial Reforms, HL Deb, 8 March 2004, c1003; Asylum and Immigration, HL Deb, 15 March 2004, c60; Sentencing, HL Deb, 26 March 2004, c951; Constitutional Reform Bill, HL Deb, 7 December 2004, c756, HL Deb, 7 December 2004, c809, HL Deb, 20 December 2004, c1540

In assessing constitutional propriety, critics may argue that this simply reverses the efforts of the CRA to guarantee a separation of the judges from Parliament, and ensure that judges are not only independent in name, but also seen to be independent and separate. This is an undeniable observation. Allowing the LCJ to resume sitting as a member of the Lords does exactly that. This is a step backwards, after the reforms of the CRA.²⁸⁸

There does seem to be a possible compromise. If the LCJs words are not making it clearly from the committee rooms to the chamber. But it is also constitutionally unacceptable for the LCJ to sit in the Lords. It might be possible for ministers in both houses to be placed under a duty to read, for the record, the words of the LCJ aloud to gathered Parliamentarians, and the content then be debated. Going further this might be changed, or extended, to include judicial consultations and group responses from the judicial college or judicial executive board. This would maintain the independence of the judiciary and keep the LCJ separate from Parliament. But present an onus on Parliament to listen to the judiciary and receive communications.

A clear disadvantage of this is however, that the LCJ would have to have considered every possible question arising from speech to be read out. Since the LCJ would not be in Parliament to answer any questions or criticisms that would arise in the ensuing debate. The need and major significance for a two-way dialogue again arises, which is possible in committee appearances. But again the problem remains that Parliament may not necessarily be interested in, nor listen to, the goings on in committee rooms. Perhaps this is where s.5 of the CRA comes into its own? The Lords Constitution Committee have already intimated

²⁸⁸ For an overview of the arguments for continuing the process of reform begun by the CRA 2005, see A W Bradley, *Relations between the executive and the judiciary: an evolving Saga*, (n18) at 488

that where s.5 is invoked, the LCJ written representations must be responded to by the government, and debated in the house. The LCJ must also be called before either this committee or the justice committee to give an account of the representation and discuss it further. This seems to be a very clear mechanism for more efficient and successful engagement. A power for the LCJ to initiate a debate in Parliament where and when the judiciary requires it. A major attitude change is needed to remove the negative connotations surrounding s.5 as a nuclear option or a tool to criticise government. The use of s.5 to lay annual reports is hardly controversial, where it serves to facilitate communication between the judiciary and Parliament as the functioning of the courts, and business of the judiciary. Likewise, where the LCJ lays other written representations aside from annual reports, these should be seen as an olive branch for constructive debate and the valuable discussions that can follow from the contributions of our most senior judges.

However these reforms that may be considered wider and far reaching, would be redundant if s.5 was no longer viewed as a nuclear option, especially if the accepted practice was for such representations to trigger a debate or consideration of the content, by both houses. There is no reason for s.5 to be viewed as a nuclear option or a means of last resort.

Discussions between the judiciary and executive, and Parliamentarians are known to go on in private, whether over the telephone, letters, or meetings, or via office staff²⁸⁹. More so, s.5 is used without much trepidation already. This thesis therefore suggests that the best way to preserve the positive changes of the CRA, is by embracing those changes and exercising the new powers of the LCJ properly and fully. Of course the frequency of use of s.5 will vary

²⁸⁹ Oral Evidence of Hope, Woolf and Judge (n253) Q33 page 6

from LCJ to LCJ. And it would be wise to follow the conclusion of Lord Neuberger in the Holdsworth speech, that if invoked too often, a judge may devalue the currency and worth of their contributions.

Conclusion: A Way Forward?

In this chapter we have drawn together the findings of our research into extrajudicial speeches and oral evidence before Parliament. In so doing we have created a series of criteria in order to assess the various means of extrajudicial comment for their success as a means of communicating judicial ideas and interacting with government and Parliament. Further we have been able to establish an overarching set of principles to guide judges when considering firstly, whether to comment extrajudicially, and secondly, what they should actually say. We have also looked at the possible alternatives that exist to make communication easier; specifically the means provided or founded in statute such as s.5 of the CRA 2005.

When looking at the fundamental principles of the separation of powers and judicial independence in the chapter one, we noted that a paradox exists. The more politicians push for a separation of powers, the greater the need for effective communication between the branches of government. Creating a UKSC, with its own finances, premises, and staff was a clear separation of the Law Lords from the upper chamber. But it brought with it new, and increasingly important topics of communication, including seeking financial approval from the government.²⁹⁰ Similarly, reforming the office of Lord Chancellor, and replacing him as

²⁹⁰ For more detail see G Gee *Guarding the guardians: the Chief Executive of the UK Supreme Court* (n116)

head of the judiciary with the Lord Chief Justice, transferred vast administrative responsibilities for the courts in staffing and administration, as well as legal procedures to the office of the Lord Chief Justice—some of which have had to be delegated to Heads of Divisions in order to make this manageable. To ensure that these senior judges are undertaking their new administrative responsibilities effectively, Parliament has a duty to scrutinise their work and hold them to account. But so too, where the means made available to judges by the government are insufficient or inadequate, Parliament has a duty to listen to judicial concerns and do something about it. Pre-2005, the key methods to do this included senior judges addressing fellow peers in the Lords, or the Lord Chancellor as head of the judiciary being minded to speak of these matters in Cabinet meetings. Post-2005 however, Law Lords are removed from the Lords, and the Lord Chancellor is solely a minister and member of the Cabinet. If the Lord Chief Justice lobbies the Lord Chancellor to speak about an issue in Cabinet, the Lord Chancellor is free to refuse to do so.²⁹¹

Of the remaining avenues for extrajudicial comment, we have seen the increasing importance of speechmaking and oral evidence, not only in isolation but in complimenting each other as a part of a larger process of communication, post-2005. Speechmaking by judges, whilst still sometimes educational, has evolved to become policy-orientated in substance, often to publicly highlight issues over which private interactions have been unsuccessful. Likewise, judicial oral evidence to Parliament is still sometimes educative, but increasingly it has become a platform for communication between senior judges and influential MPs and peers. Significantly, we have found in this thesis, that speechmaking can be a trigger for a committee appearance. Especially where the matter is the subject of the committee's current inquiry, or

²⁹¹ Lord Judge in evidence to the HLCC (n199) Q2; HLCC, *Relations between the executive, the judiciary and Parliament* (n26) at page 17

the committee feels a need to probe and look deeper into the judge's extrajudicial comments. These judicial concerns may then be noted in the committee's final report and published, and accessible to all MPs and peers. It seems that this is the prevailing means of judicial-political communication, post-2005.

There are a number of inadequacies we have seen to this. We know that committees have a discretion to include whatever comments they see as central to their line of inquiry in the final report. Therefore judicial concerns are not guaranteed to appear there. Similarly, even if included and published, there is no guarantees that all MPs and peers will read that report, with an even smaller assurance of the possibility of any of them acting upon it. This deficiency for judicial-political communication is currently addressed by retired judges, such as former Chief Justices, and Presidents of the Supreme Court, taking up their seat in the Lords and moving amendments where necessary, and speaking to other peers about pertinent issues. But this subtle, and 'back-door' action cannot be considered sustainable or effective, despite its limited success.²⁹²

Far from commending the repeal of certain parts of the CRA, or proposing more radical reform, this thesis suggests that the best way forward is to address the deficiencies in the current status quo. Extrajudicial speech-making and oral evidence before Parliamentary committees have evolved, and at times linked together, to establish a way for judges to communicate with MPs and peers. But there are shortcomings i.e. the discretion of committees to discard judicial concerns when preparing the final report, and the real chance that few MPs and peers will read the reports containing these judicial concerns. It is suggested

²⁹² Lord Philips may have been able to move amendments to the Crime and Courts Bill to ensure the independence of the Supreme Court Chief Executive, but was in no position to amend proposed legislation cutting legal aid, or restricting access to judicial review

that a way forward can be found using s.5 as set out in the CRA, with an amendment to include the President of the Supreme Court and Heads of Divisions, and agreeing a process for receiving the written representations of the senior judges. Initiating a subsequent committee appearances over the issues contained therein, and forcing a Parliamentary debate over the issue. It is accepted that this may still face problems, for example where the Parliamentary timetable cannot allow for a hearing or debate at an early stage, or where MPs and peers refuse to be drawn in or attend the debate in the chamber. But it seems that such a response will only be likely if the power under s.5 is used too often, so much so, that it would devalue the significance attached to senior judges initiating a Parliamentary discussion. Given the reluctance by Chief Justices to use s.5 in its current state, there should be little concern of this happening.

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